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REPORTS OF CASES DECIDED

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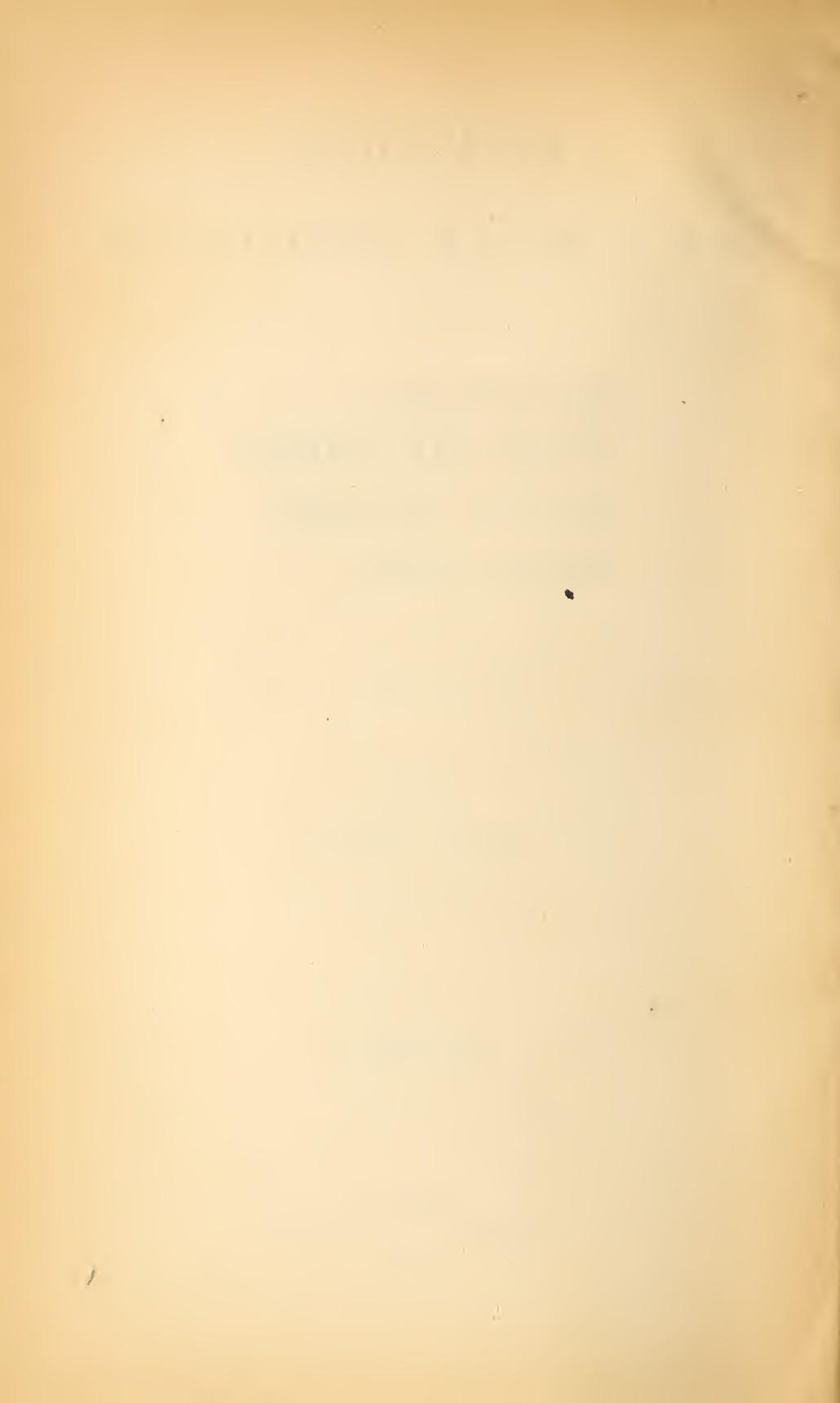
PRACTICE COURT,
COMMON LAW CHAMBERS,
CHANCERY CHAMBERS,
MASTER'S OFFICE.

EDITED BY
HENRY O'BRIEN,
BARRISTER-AT-LAW.

VOLUME VI.

TORONTO:
ROWSELL & HUTCHISON.

1876.



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REPORTS

OF CASES DECIDED IN

PRACTICE COURT, AND IN COMMON LAW AND CHANCERY CHAMBERS.

* * * This series of Reports is in continuation of the Practice Reports, of which the last volume was Vol. V., ending with the year 1871; and of Chancery Chambers Reports, which will conclude with Vol. IV., and end with the year 1872.

COMMON LAW CHAMBERS.

IN RE BROWN AND WALLACE.

32 Vict. cap. 32, secs. 23, 36, O.—*Tavern License Act*
—*Trial by Judge without jury—Depositions
as evidence—Prohibition.*

Held, 1. After an appeal to the Sessions from a conviction of a magistrate for selling liquor after 7 o'clock on Saturday evening, under 32 Vict. cap. 32, sec. 23, is confirmed, a prohibition to the Sessions will not be granted.

Held, 2. That under the above section, it is irregular for the judge who tries the case to call a jury, or to receive depositions of witnesses as evidence, but this is not ground for a prohibition.

[January 5, 1872—*Galt, J.*]

Osler obtained a summons, calling upon John Wallace, and George Duggan, Esq., the Chairman of the General Sessions of the Peace for the County of York, to shew cause why a writ of prohibition should not be ordered to issue out of this court to prohibit the said Court of General Sessions of the Peace from further proceeding in the matter of an appeal to the said court, wherein one Thomas Brown was appellant and one John Wallace was respondent, being an appeal from a certain conviction made by Alexander MacNabb, Esquire, Police Magistrate of the said City of Toronto, against the said Thomas Brown, on the twenty-third day of November,

and which said appeal came on to be tried at the said Sessions on December 16th, 1871, and was dismissed, and the said conviction affirmed with costs—on the grounds :

1st. That the said appeal was tried by a jury who were called and sworn upon the matter of the said appeal, and not by the said Chairman of the said Sessions, as required by the Statute in that behalf;

2nd. That the respondent gave no evidence in support of the said conviction, and that the learned Chairman of the said Sessions allowed the respondent to read to the said jury the depositions of the witnesses for the prosecution taken in the Police Court on the hearing of the information, instead of giving the *viva voce* testimony of the said witnesses themselves.

3rd. That the said conviction was affirmed without evidence, and the said Sessions exceeded their jurisdiction in so doing.

The facts of the case material to the application were as follows :

The applicant Brown had been convicted in the Police Court of the City of Toronto, upon the evidence of two witnesses, and fined in the sum of \$20 and costs, for selling liquor after 7 o'clock on Saturday evening contrary to sec. 23, of cap. 32, 32 Vict., O. H. appealed from this

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1871, for that he the said Thomas Brown on November 11th, 1871, sold intoxicating liquors after seven o'clock in the evening of that day, conviction to the Court of General Sessions, pursuant to C. S. U. C. cap. 114, and 32 Vict. cap. 32, sec. 36, O., which provides that such appeal "shall be tried by the Chairman of the Court without a jury."

The appeal came on to be heard at the Sessions, when the Chairman, with the consent of the appellant, but against the wish of the respondent, who contended that under the statute the appeal should be tried by him alone, directed a jury to be sworn to try the appeal. The respondent opened his case, and then offered evidence to shew that the witnesses upon whose evidence in the Police Court the appellant was convicted had left the Province, and he proposed to read their depositions taken in the Police Court as evidence in the trial of the appeal. The appellant objected that the depositions in question were not evidence, that the absence of the witnesses from the country did not entitle the prosecutor to read them, and that the witnesses themselves should be called. The learned Chairman of the Sessions overruled the objections, and the absence of the witnesses being proved, their depositions were admitted, and the conviction was affirmed with costs.

The summons for prohibition was then taken out.

Hurd, on behalf of the Chairman of the Sessions and of the respondent, shewed cause

Prohibition is not the proper remedy, and justice has been done. The effect of a prohibition would be unfair, and put respondent in a worse position than before the appeal. If the appellant has any remedy it would be by error.

The effect of a prohibition if allowed would be the same as a *certiorari*, the right to which is taken away: 33 Vict. cap. 27, sec. 2, Can.

The appellant cannot take the objection that the case was tried by a jury, as the jury was called at his instance, and if he can, it may be said that the case was tried by the judge if he accepts their finding and makes it his own judgment. But we say that 32 Vict. cap. 32, sec. 36, O., is overridden by 32-33 Vict. cap. 31, Can., as amended by 33 Vict. cap. 27, Can., which govern in the matter of this appeal.

Osler supported the summons.

The Sessions have exceeded their jurisdiction in trying the case before a jury. The statute is express and positive in its terms, "shall be tried by the Chairman without a jury;" sec. 36, cap. 32, 32 Vic., O., and the appellant is not estopped from objecting to the jurisdiction by having consented to the jury being sworn: *Smith v. Rooney*, 12 U.C.Q. B. 661; *Yates v. Palmer*, 6 D. & L. 283; 1 T. R. 552; 2 Just. 602, 607.*

Prohibition lies from the Queen's Bench to the Sessions: *Reg. v. Herford*, 3 E. & E. 115.

If inferior courts assume a greater or other jurisdiction than that allowed by law, or refuse to allow an act of Parliament, Superior Courts will control them by prohibition: *Bac. Abr.*; Title Prohibition, C. p. 568; *Ib. Prohibition*, K. p. 557.

The court here has assumed a jurisdiction other than that allowed by law in another respect, in that it has decided the appeal without evidence, the depositions not being legal evidence and not receivable: *Roscoe Cr. Ev.*, Ed. 6, pp. 65, 71; *Dickenson's Qu. Sess.*, pp. 525, 643, 644; *Reg. v. Austin*, 25 L. J., M. C. 48; Indictable Offences Act, 32-33 Vict. cap. 30, sec. 30, Can., applies only to depositions taken on a preliminary investigation in a criminal matter. The appeal here was an entirely new proceeding, and the prosecutor had to begin *de novo*: *Dickenson*, 643, 644.

The appeal was governed by the Statute of Ontario, not by the Summary Conviction Act of Canada, 32, 33 Vict. cap. 31, for the subject of it was not a crime under sec. 1, and it was in relation to a matter wholly within the jurisdiction of the Provincial Legislature: B. N. A. Act, sec. 92, sub-sec. 9.

GALT, J. (having consulted *HAGARTY*, C. J. C. P.)—There is no doubt that the whole of the proceedings of the Sessions were entirely irregular; but I see a difficulty in granting a prohibition. How is the appeal to be disposed of? If we could grant a conditional prohibition until the next Sessions we might relieve the appellant, but it cannot be disputed that there was jurisdiction to *entertain the appeal*. Are then the facts, that a jury was sworn to try the appeal,

* See *Mossop v. Great Northern R. W. Co.*, 26 L. T. 92, and cases there cited.—REP.

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and that improper evidence was received, reason for granting a writ of prohibition? I think not. The judge might accept the verdict of the jury, and make it the judgment of the court. I do not think that the other ground taken by the summons, that the Sessions proceeded without evidence, can be put higher than the admission of improper evidence, and this is no ground for a prohibition.

The summons must be discharged, but under the circumstances without costs.

Summons discharged without costs.

BIGELOW v. CLEVERDON.

C. L. P. Act, sec. 158—Compulsory reference.

Under the above section a country cause may be referred to the arbitration of an officer of the proper Court at Toronto, as well as to the County Judge.

[January 13, 1872.—*Mr. Dalton.*]

Tilt having obtained a summons under Con. Stat. U. C. cap. 12, sec. 158, to show cause why the matters in dispute should not be referred to the arbitration of the Judge of the County Court of the County of Wentworth, or such other person as might be appointed, now asked that the reference might be made to Mr. Jackson, the Clerk of the Common Pleas, in which Court the action was brought. The writ had been issued in the County of Wentworth. The plaintiff had not declared.

Mr. Clute (Harrison, Osler & Moss).—It would be more convenient to try the case at Hamilton, in the County of Wentworth, and by the statute the reference must be to the Judge of that County, the writ having issued there; and the case cannot be referred to the Clerk of the Court in Toronto: *Cotton v. McKenzie*, 2 U. C. L. J. 344; *McEdward v. McEdward*, 2 U. C. L. J. 75.

Mr. DALTON.—Under the circumstances of this case, it must be referred to the Judge of the County of Wentworth, though I am reluctant to burden him with it, as he is not, as Judge, entitled to any fees.* I do not think, however,

that in country causes the reference *must* be made to the proper County Judge. The words of the Statute do not limit the reference to him, but merely state that a reference may be made to him in country causes as well as to the officer whose appointment is authorized by the preceding words of the section. I am quite clear that a case like this might properly be referred to an officer of the Court at Toronto.

Order accordingly.

JAMESON AND CARROLL v. KERR,
GALLEY v. KERR.

Replevin—Assignee in Insolvency—Con. Stat. U. C. cap. 29, sec. 2—Insolvent Act, 1869, sec. 50.

Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding Con. Stat. U. C. cap. 29, sec. 2.

The question as to how far goods seized under an execution or attachment are protected from the remedy by replevin discussed.

[February 8, 1872.—*Gwynne, J.*]

J. H. Macdonald for Jameson and Carroll, and *Clarke* for Galley, moved before Mr. Dalton for orders to replevy certain bricks which had been seized by the Sheriff of the County of York, under an attachment in insolvency against one Moran, and handed over by the sheriff to Mr. Kerr, an official assignee, as guardian. The applicants claimed these bricks as their property, having purchased them from Moran.

Mr. Dalton refused to grant orders for writs of replevin on the ground that section 2 of the Replevin Act precluded replevin under such circumstances. From this decision the applicants appealed to a Judge. The matter was then argued before Mr. Justice Gwynne, who, reversing the decision of Mr. Dalton, ordered writs of replevin to issue. The further facts of the case appear in the following judgment of

Gwynne, J..—These were two summonses by way of appeal from two orders made by Mr. Dalton in these cases, whereby he discharged two several summonses asking for writs of replevin to issue in these suits, and refused to grant the

* It is usual now for references such as those alluded to above to be made to a County Judge, mentioning him by name merely, without reference to his public capacity, so as to get over the difficulty as to fees. This can only be done, of course, by consent of the parties.—*Rep.*

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writs of replevin, upon the ground that the goods sought to be replevied were in the custody of Mr. Kerr, an official assignee, as guardian, under a delivery to him, by the sheriff, of the goods in question, seized under a writ of attachment issued from the County Court in compulsory liquidation against one Moran, an insolvent.

The evidence offered upon affidavits by the applicants is strong to show, and conclusive, if not contradicted, that the goods in question, namely divers kilns of bricks, were the property respectively of the applicants. No affidavits are offered in opposition to the title set up by them; it may be that Mr. Kerr, being official assignee, can admit nothing. The case, therefore, stands thus: that the evidence of title offered by the applicants, although not admitted, is not denied; the property seized is shown to be of that nature that, having regard to the business of the respective applicants, namely that of builders, they may be exposed to very serious injury if the property should not be restored to them, which any damages which they might recover in actions of trespass would not reimburse them for, and Mr. Dalton, I am informed by himself, felt this so strongly that he would have granted the writs without hesitation, if he had not considered himself fettered by the language of the second section of the Replevin Act, Con. Stat. U.C. ch. 29.

By that section it is provided that "the provisions herein contained shall not authorize the replevying of, or taking out of the custody of any sheriff or other officer, any personal property seized by him under any process issued out of any court of record for Upper Canada." The section is consolidated from 18 Vict. ch. 118. In order to put a correct construction upon this section, it will be necessary to consider what was the law before the passing of the Act from which this section is taken, for the purpose of consolidation, and what was the object of the Act.

Although it was held in England in the cases collected and cited in *Harling v. Mayville*, 21 U. C. C. P. 499, that replevin lay for *any wrongful taking* of property from the possession of the true owner, still it never lay where the taking was in execution under a judgment of a superior court, and the reason is given by Parke, B., in *George v. Chambers*, 11 M. & W. 160, citing Chief Baron Gilbert's treatise on Replevin, p. 138, as his authority, where it is said, "If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by

virtue of the execution; and if any person shall pretend to take out a replevin and execute it, the court of justice would commit him for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, and it would be troubling the execution awarded, if the party upon whom the money was to be levied, should fetch back the goods by replevin, and therefore they construe such endeavour, to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the court, they will treat it as a contempt, and punish it by attachment of the sheriff."

In the case of *Rex v. Monkhouse*, 2 Str. 1184, the court granted an attachment against a sheriff for granting a replevin of goods distrained on a conviction for deer stealing, for the reason that the conviction was conclusive and its legality could not be questioned in replevin; and in *Earl Radnor v. Reeve*, 2 Bos. & Pul. 391, the court said that it had been determined that when a statute provides that the judgment of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way; and so not in replevin.

In *Pritchard v. Stephens*, 6 T. R. 522, where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin moved into the King's Bench, the court refused to quash the proceedings, leaving it to the defendant in replevin to put his objection in a formal manner on the record. In that case Callis is cited, p. 200, where he says, "If upon a judgment given in the King's Court, or upon a decree made in the court of sewers, a writ or warrant of *distingas ad reparationem* or of that nature be awarded, and the party's goods be thereby taken, these goods ought not to be delivered to be taken either out of this court or out of any other court of the King, because it is an execution out of a judgment," and it is said there, citing another passage of Callis, p. 197, that there is a distinction between those goods that remain in the custody of the officer under the seizure and those that afterwards come into the hands of a purchaser, saying that the former are not repleviable; however, the court refused to quash the proceedings, leaving the defendant to raise his defence upon the record, although the goods were replevied out of the hands of the officer acting under the decree and warrant of the court of sewers.

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Thus, then, the law stood in England, that for any wrongful taking a replevin lay except where the taking was in execution under a judgment of a superior court, or of an inferior tribunal whose judgment was by statute made final and conclusive, to which may be added the further exception where the taking was in order to a condemnation under the revenue laws : *Cawthorne v. Campbell*, 1 Anst. 205, or for a duty due to the crown : *Rex v. Oliver*, Bun. 14, and the reason of the law that goods taken in execution could not be replevied was that it could not be endured that the cause of justice should be frustrated by permitting the party, upon whom the money was to be levied, in satisfaction of a judgment of a superior court, or of a judgment or conviction made final by a statute to fetch back the goods by replevin, and so delay the plaintiff in his recovery of the fruits of his judgment. The reason there given for the courts in England, holding it to be a contempt of court for a party to proceed, and consequently for their not permitting him to proceed by replevin, in respect of a seizure under an execution issued out of a superior court, applies only to the case of a replevin brought or attempted to be brought by him against whom the execution issued.

While adopting the same principle, there have been, in the Supreme court in the State of New York, several cases of replevin being maintained even against a sheriff in respect of goods taken in execution.

In *Clark v. Skinner*, 20 Johnson, 465, it was held that replevin lies at the suit of the owner of a chattel against a sheriff, constable, or other officer who has taken it from the owner's servant or agent while employed in the owner's business, by virtue of an execution against such servant or agent, the actual possession of the property in such case being considered as remaining in the owner, and not in the defendant in the execution. *Platt, J.*, in giving judgment says, “Suppose John Clark, (against whom the execution was and from whom the goods were taken) had taken the horse and sleigh as a trespasser himself, would they be in the custody of the law as to the true owner, because the constable happened to find them in the hands of a person against whom he had an execution? If I leave my watch to be repaired, or my horse to be shod, and it be taken on a *ft. fa.* against the watchmaker or blacksmith, shall I not have replevin? If the owner put his goods on board a vessel to be transported, shall he not have this remedy, if they are taken on an execution against the

master of the vessel? It seems to me indispensable for the due protection of personal property. In many cases it would be mockery to say to the owner—Bring an action of trespass or trover against the man who has despoiled you. Insolvency would be both a sword and a shield for trespassers. Besides there are many cases where the possession of chattels is of more value to the owner than the estimated value in money, and the action of detinue is so slow and uncertain, as a specific remedy, that it has become nearly obsolete.” “The rule,” he proceeds, “I believe is without exception, that wherever trespass will lie the injured party may maintain replevin. Baron Comyns says, ‘Replevin lies of all goods and chattels unlawfully taken,’ (6 Com. Dig. Replevin A.) ‘Though,’ he says, (Replevin D) ‘replevin does not lie for goods taken in execution. This last proposition,’ he adds, ‘is certainly not true without important qualifications. *I* is untrue as to goods taken in execution where the *ft. fa.* is against *A*, and the goods are taken from the possession of *B*, (being the property of the latter, is plainly intended).’ ‘By goods,’ he proceeds, ‘taken in execution, I understand goods rightfully taken in obedience to the writ, but if, through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were taken in execution, in the true sense of the rule laid down by Baron Comyns.’”

In *Thompson v. Button*, 14 Johnson, 84, it is laid down that goods taken in execution by a sheriff out of the possession of the defendant in the execution, being in the custody of the law, cannot be replevied, but if the officer having an execution against *A*, undertakes to execute it on goods in the possession of *B*, the latter may bring replevin for them. The chief justice in giving judgment says, “As a general principle, it is undoubtedly true that goods taken in execution are in the custody of the law, and it would be repugnant to sound principles to permit them to be taken out of such custody, when the officer has found them in and taken them out of the possession of the defendant in the execution.” This judgment is in precise accord with the law of England, as I understand it.

In *Hall v. Tuttle*, 2 Wend. 476, the law is laid down in precisely the same language. The court, in giving judgment, adds, “The sheriff levies at his peril, if the property does not belong to the defendant in the execution.”

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In *Dunkin v. Wyckoff*, 3 Wend. 279, the case came up on demurrer, which admitted that the property in the goods seized under execution was in the plaintiff in replevin, although when seized they were in the possession of the person against whom the judgment and execution was had. Judgment was given for the plaintiff on the demurrer, as the pleadings admitted the property to be his. A similar point was decided on errors in *Acker v. Campbell*, 33 Wend. 372.

The principle upon which these cases proceed seems to be in accord with that stated by Chief Baron Gilbert as the principle upon which the courts in England refused to permit replevin to be brought in respect of goods seized under an execution issued upon a judgment recovered in the superior courts.

Our law of replevin in this country would seem to have its foundation in 4 Wm. IV. cap. 7; for the sheriff in this country, having no county court, it is difficult to see how the action could have been brought before that statute. See *Hutt v. Keith*, 1 U. C. Q. B. 478. By that Act, the remedy seems to have been limited to the case of a wrongful distress, probably because of there having been an opinion prevalent that it was only in such case that replevin lay in England. The Act provides that any person complaining of a wrongful distress in a case in which by the law of England replevin might be made, may, on filing a praecipe, obtain from the crown office a writ of replevin in a form given by the statute.

This law was amended by 14 & 15 Vict. cap. 64, A.D. 1851, whereby it was enacted "that whenever any goods, chattels, deeds, &c., valuable securities or other personal property or effects has been or shall be wrongfully distrained or otherwise wrongfully taken, or has been or shall be wrongfully detained, the owner, or person or corporation who by law can now maintain an action of trespass or trover for personal property shall have and may bring an action of replevin for the recovery of such goods, chattels or other personal property aforesaid, and for the recovery of damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are now by law brought and maintained by any person complaining of an unlawful distress." The writ was to be obtained only upon an affidavit of the claimant, his servant or agent, that the person claiming is the owner of the property claimed, describing it.

The effect of this Act was to introduce the law as existing in England, namely, to authorize replevin to be brought for any wrongful taking, with this further addition, that it should also lie wherever trover lay.

It happily seldom occurs that a sheriff or his officer, under a writ of execution against B, wantonly and vexatiously, and without any reasonable excuse, takes from A his goods, of which he is in actual visible possession as undisputed owner. Consequently, we do not find that to redress such a wrong, any person required to avail themselves of the privilege of the Act by bringing replevin.

But cases of persons not being in actual possession, but claiming to be the owners, by virtue of some contract with an execution debtor, of goods taken under an execution from the actual visible possession of an execution debtor as apparent owner, are cases which do frequently occur in practice. *In such cases as last mentioned the action of replevin did not lie according to the law of England.* That remedy was not only available when goods were taken from and out of the possession of the plaintiff in replevin, who also claimed to be the true owner and therefore entitled to retain the possession and enjoyment of the goods taken, replevin being the re-delivery of the goods taken to the person from whose actual possession they were taken, upon pledges given by him to prosecute his claim of right to retain such possession. Although, according to the law of England, the real owner of goods taken under execution from the actual possession of an execution debtor as apparent owner, could not maintain replevin, nevertheless, upon the construction put upon 14 & 15 Vict. cap. 64, such persons were permitted in this Province to bring replevin against the sheriff, and to have his right tried in that form of action. Of such class of actions, *Short v. Ruttan*, 12 U. C. Q. B. 79, is an example.

The words of the Act authorizing the owner to bring replevin in all cases wherein he could maintain trespass or trover, seemed to authorize him to bring an action of replevin, although the goods were never taken out of his actual possession, and although according to the law of England replevin in such a case could not be maintained. Doubts, however, were entertained whether it could have been the intention of the Legislature to place the remedy by replevin upon a footing so different from that upon which *ex i termini*, and according to the law of England, it

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stood in England. Accordingly, to remove these doubts, the Act 18 Vict. cap. 118, appears to have been passed. The preamble of that Act recited that "Whereas doubts have arisen whether by the provisions of a certain Act of the Parliament of this Province, passed in the fourteenth and fifteenth years of Her Majesty's reign, entitled, 'An Act to amend and extend the law relative to the remedy by replevin in Upper Canada,' when any goods and chattels or other personal property and effects in the said Act mentioned have been seized and taken in execution, or by attachment or otherwise, under process from any Court of Record in Upper Canada, the same can be replevied and taken out of the hands and custody of the sheriff or other officer to whom the execution of such process of right belongs. And whereas it is expedient to remove such doubts,"—and the Act declared that the said Act did not authorize, and shall not be construed to have authorized and permitted, or to authorize and permit, the replevying and taking out of the hands and custody of any sheriff or other officer, as aforesaid, any such goods and chattels, which such sheriff or other officer shall have seized and taken, and shall have in his lawful keeping under and by virtue of any process whatsoever issued out of Her Majesty's Courts of Record in Upper Canada. Upon the passing of this Act it was held in accordance with the law as it was always understood in England, that a person out of possession could not maintain replevin in respect of goods seized and taken in execution from and out of the possession of the execution debtor: *Calcutt v. Ruttan*, 13 U.C.Q.B. 146. That decision is what would have been decided if the remedy by replevin had existed in this Province precisely as it existed in England, and the 14 & 15 Vict. cap. 64, had never been passed.

In so far as goods taken in execution were concerned, the object and effect of the Act 18 Vict. seems to have been to place the law in this Province upon the same footing as in like cases it was in England; but the Act went further and extended to goods seized under an attachment against absconding debtors *the like* protection from the remedy by replevin, and, as it seems to me, *only the like* protection as by the law of England surrounded goods taken in execution. And there appears to be some reason for this, although the writ of attachment is not preceded by a judgment, as an execution is; because by the Act respecting absconding debtors in force at the time of the passing of 18 Vict. ch. 118, namely, 2 Wm. 4. ch. 5, sec. 4, pro-

vision was made, more effectual than replevin, and the like provision now exists under Con. Stat., 22 Vict. cap. 25, for superseding the attachment and obtaining restoration of his goods upon the application of the defendant in the suit, on his giving bail in respect of the action in which the attachment issued. The language of the Act 18 Vict. cap. 118, namely, "any such goods and chattels which such sheriff or other officer shall have seized and taken, and shall have in his lawful keeping under and by virtue of any process, &c.," seems to me to accord precisely with the judgment of Platt, J., in *Clark v. Skinner*, 20 Johnson's Reports, *supra*, wherein he says: "By goods taken in execution I understand goods rightfully taken in obedience to the writ," but if through design or mistake the officer "takes from A goods which are not the property of (nor, I add, in the possession of) the defendant in the execution when taken, he is a trespasser, and such goods never were taken in execution in the true sense of the rule laid down by Baron Comyns"—goods of which the defendant is in possession when seized under and by virtue of any process against him authorizing the seizure of his goods and chattels are in the lawful keeping of the officer, under and by virtue of the process, because the possession of goods *prima facie* implies property—but if a sheriff or his bailiff, or the bailiff of a division court, (for 23 Vict. cap. 45, sec. 8, places goods seized by him under any process issued out of a division court in precisely the same position, as to the action of replevin, as 18 Vict. cap. 118 did goods seized by a sheriff under process from any court of record,) wantonly and causelessly, and, it may be, maliciously, takes from the actual and undisputed possession of the real owner *his* goods under colour and pretence of an execution or other process which he has for execution upon the goods of another, shall the person upon whom such wanton wrong may be committed, be held to be deprived of a right, recognized by the law of England, of availing himself of the only remedy which in the given case may be competent to secure him any adequate redress.

The second section of Con. Stat. U. C. c. 29, is expressed in briefer language than 18 Vict. c. 118, but the substance and effect of both is the same, and both must receive the same construction. Now, certain of the goods of a judgment debtor are by law specially exempt from all liability under any execution issued upon the judgment: as, for example, the bed, bedding and bedsteads in ordinary use by the debtor; the necessary and ordinary wearing apparel of

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himself and his family; the tools of his trade, to a certain amount. If, then, a sheriff's bailiff, or the bailiff of a division court, although the right of exemption should be claimed, should vexatiously and wantonly seize these exempted articles; or if a sheriff's bailiff, or the bailiff of a division court, without any pretence of right, should vexatiously and wantonly enter the house of A, and strip it of all his household furniture in his actual use, merely because the bailiff has in his hands an execution or other process against the goods of B; or if a sheriff's bailiff, under like circumstances, should seize a raft of timber belonging to A, and in his possession, on its way for delivery to C, under a contract which A is bound under heavy penalties to fulfil, and should so cause a breach of the contract; or if, under like circumstances, and it may be by fraudulent collusion with B, the execution debtor, or with his creditor, the sheriff should seize a steamship belonging to A, and in his possession, freighted with goods and passengers at the moment of its departure from port on its voyage, and so prevent the voyage altogether—can any of these goods so wrongfully seized be, with any propriety of language, said to be in the lawful keeping of the sheriff or bailiff, under and by virtue of a process which neither directs nor warrants any such service. Or shall it be said that a judge, when invoked to permit the party so wronged to seek redress in the only form of action which can give him any relief, shall have no jurisdiction to do so? Similar instances without number, of wanton injury, might be enumerated, where the goods of an utter stranger to the process in the bailiff's hands, and to the person against whom it has issued, may be wrongfully and vexatiously seized by the officer; whereas, if a judge, upon hearing the parties, and being satisfied that the seizure is utterly inexcusable, cannot sanction the issuing of the writ of replevin, the hands of justice must be admitted to be most cruelly tied. I am not aware of any case which has held that justice is so crippled.

In this case I am not called upon, however, to rest my decision upon the ground that in answer to the application for the writs there is no denial of what is plainly asserted on oath, namely, that the goods seized were the property of and in the possession of the claimants when seized, and that they were wrongfully seized without any process authorizing such seizure; for I am of opinion that the goods now being in possession of the official assignee are not in the custody of the sheriff or

other officer under the process, within the meaning of sec. 2 of 22 Vict. cap. 29, even though that section could protect the goods in the hands of the sheriff from being reached by a writ of replevin.

The execution of all process coming out of courts of record to be executed, belongs to the sheriff of the county to whom it is addressed, except when the sheriff is himself a party, when it belongs to the coroner to execute it.

The term, then, "sheriff or other officer," in 18 Vict. cap. 118, and in 22 Vict. cap. 29, sec. 2, as indeed is plainly expressed in 18 Vict. means a sheriff or other like officer, as his deputy, bailiff, or a coroner, "*to whom the execution of such process of right belongs;*" and what is declared not to have been authorized is the replevying the goods which *such* sheriff or other officer shall have seized under or by virtue of the process out of his hands. Now, when the sheriff has transferred the goods seized under an attachment in insolvency, in discharge of his duty under the process placed in his hands to the official assignee in insolvency, they came into his hands and could only be detained therein as and if they are the property of the insolvent. In no other event can the official assignee retain the goods. He becomes liable to the true owner, from whom they were wrongfully taken, not by reason of the original wrongful taking, but by reason of his own wrongful detention of goods not belonging to the insolvent after a demand made for them upon him by the true owner, from whom they had been taken. Such wrongful detention cannot be justified by the assertion that the sheriff, who had wrongfully seized the goods, had given them to the assignee. If the goods were now in the hands of the sheriff, he, to set himself right with the true owner, and to protect himself from an action, might unhesitatingly restore the goods to the owner. When the official assignee, to whom he has delivered them (upon demand being made upon him by the true owner), refuses to restore them, *he* becomes a wrong-doer himself, wholly independently of the sheriff and of the wrong committed by him, and must be responsible for his own acts.

The affidavits and arguments upon the appeals leave no doubt on my mind that these are cases in which I have a discretion enabling me to grant writs of replevin, and that I properly exercise that discretion by granting them, which

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I therefore do without further delay, to enable the official assignee, if so advised, to have my judgment reviewed by the court during the present Term; and as the Act of 1860 enables me to direct that a bond may be taken in less than treble the amount of the property I think it proper to limit the amount to a sum not exceeding four thousand dollars in each case. The orders of Mr. Dalton will therefore be set aside and the orders will go for the writs of replevin.

Orders accordingly.

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Insolvent Act, 1869, sec. 134.—Appeal.—Death of insolvent.

When an insolvent, who has appealed from the decision of a County Judge refusing to set aside an attachment against him, dies during the pendency of this appeal and no personal representative has been appointed the appeal fails.

[February 28, 1872.—*Galt, J.*]

This was an appeal from the judgment of the County Judge of the County of Lincoln refusing a petition of the defendant to set aside an attachment issued against him as an insolvent.

Since the decision of the learned Judge of the County Court was given, McMahon, the insolvent, died intestate, and no letters of administration had been granted to any person.

Harrison, Q. C., contended that under sec. 134 of the Insolvent Act of 1869, this appeal could be prosecuted notwithstanding the death of the petitioner, and though no person had been authorized to administer to his estate.

T. Moss appeared for the creditors, and urged that under the circumstances no further steps could be taken in the matter.

GALT, J.—It is unnecessary to consider the grounds of appeal against the judgment if there is no person authorized to bring them forward. The 134th section, as it appears to me, expressly requires that any persons who wish, on behalf of the insolvent, to interfere in the proceedings in insolvency on behalf of the estate of the debtor, must be clothed with authority to act as his legal representative, and as there is no person at present in that position I have no jurisdiction to entertain the matter.

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Change of Venue.

When the place where the cause of action arose and the place of residence of the defendant and his witnesses concur, a change of venue will be ordered to such county, although the plaintiff's witnesses reside where the venue is laid.

[March 19, 1872.—*Mr. Dalton.*]

J. K. Kerr obtained a summons calling on the plaintiff to show cause why the venue should not be changed from the County of Haldimand to the County of Wentworth, on the ground that the cause of action arose in the latter county, and that the cause could be more conveniently tried there.

The application was made before plea, and after declaration. The action was brought for malicious arrest. In support of the application the defendant's affidavit was filed, showing that the arrest complained of was made at Hamilton, in the County of Wentworth: that the plaintiff had been tried and acquitted there on the charge upon which he was arrested, that nearly all the witnesses to be examined resided in Hamilton: that all the defendant's witnesses resided in that city, there being six of whom he then knew, and that the trial of the cause in Haldimand instead of in Wentworth would cause unnecessary expense which would be saved by the proposed change of venue.

Osler showed cause, and cited *Diamond v. Gray*, 5 P. R. 33, and *Helliwell v. Hobson*, 3 C. B. N. S. 761. The defendant must show a preponderance of convenience greatly in his favour, and he has not done so on this application, and unless that be shown, the plaintiff can lay the venue where he likes; and in addition, it is shown that the defendant cannot have a fair trial at Hamilton, which is another reason why the plaintiff should not be deprived of his right to lay the venue where he chooses. He filed affidavits of the plaintiff, to the effect that he lived near Cayuga, in the County of Haldimand: that one William Hall, and other witnesses, all of whom reside near Cayuga, were necessary witnesses on his behalf, all of whom he intended to subpoena: that he had at least four witnesses residing near Cayuga: that a trial at Cayuga, where the assizes last only for a few days, would be less expensive than at Hamilton, where the assizes always last a long time, and where it is more expensive to live and keep witnesses while waiting for the trial than at

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Cayuga: that the defendant is a grain-buyer, and has many friends at Hamilton, where the plaintiff is a stranger; that there are many grain-buyers who have great influence there, all of whom are making common cause against him, and that he is certain he cannot obtain a fair trial at Hamilton owing to the influence the defendant and his friends can there bring against him.

J. K. Kerr, contra. The venue should be laid where the cause of action arose, and that is the proper place for the trial unless a preponderance of convenience requires the trial to be elsewhere: *Levy et al. v. Rice*, L.R. 5 C.P. 119. In this case the balance of convenience concurs with the place where the cause of action arose, and the defendant resides. *Hellincell v. Hobson* has been called in question more than once. In *Durie v. Hopwood*, 7 C. B. N. S. 835, Erle, C. J., said "It is important that a cause should be tried where the cause of action arose, and I think it advisable to act on that principle so far as the interests of justice can be made to coincide with that course." In *Church v. Barnett*, L. R. 6 C. P. 116, the court would not reverse the order of the Master and the Judges who heard the appeal, but Montague Smith, J., said "If the matter had come before me in the first instance, this motion probably would not have been necessary." As to the danger of not getting a fair trial, the defendant has been tried and acquitted at Hamilton on the charge out of which this action arose, and *Roche v. Patrick*, 5 P. R. 210, establishes that this is not material.

MR. DALTON.—In considering the question as to what is the proper place for the trial of an action, I think much importance should be attached to the place where the cause of action arose. That is the proper place for the trial unless the balance of convenience is against having the trial there. Since the decision in *Levy et al. v. Rice*, L. R. 5 C.P. 119, referred to in the argument, I think it is settled, as laid down by Bovill, C. J., "that the cause ought to be tried where the contract was made, where the breach took place, and where the defendant resides;" and by Montague Smith, J., "probably the best rule is that when the preponderance of convenience, and the place of contract, and of the defendant's residence concur, these should regulate the Judge's decision in ordering a change of venue." In the case before me the cause of action, the defendant's residence, and

the preponderance of convenience (although not great) all concur, and I therefore think the venue should be changed to Wentworth.

Order accordingly.

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Judge in Chambers—Setting aside final judgment—Filing affidavits on return of summons.

A judge in chambers has power to set aside on the merits a final judgment signed on default of plea.

Affidavits allowed to be read, though not filed when summons taken out; leave having been in fact given by the judge, but no notice thereof given to the opposite party.

[March 22, 1872.—*Mr. Dalton.*]

Action against administrator on a note made by intestate. The plaintiff signed final judgment on default of plea. The defendant then applied to set aside this judgment on the merits, accounting for his laches.

O'Brien showed cause. A judge in chambers has no jurisdiction to set aside a final judgment except when specially given him by statute, as in C. L. P. Act, sec. 55: *Mearns v. G. T. R. Co.* 6 U. C. L. J. 62. See also *Ross v. Grange* 27 U. C. Q. B. 306 and C. S. U. C. c. 10, sec. 10. The application should be to stay proceedings: *Richmond v. Proctor* 3 U. C. L. J. 202. He also objected to certain affidavits being read as they were not filed when summons was taken out and no leave granted to file them on its return.

Keefer, contra.

MR. DALTON.—I shall allow the affidavits to be read as leave was substantially given to the defendant to file further affidavits on the return of the summons. The neglect to notice it in the summons is a mistake on the defendant's part, and if it rendered necessary an enlargement by the plaintiff, it would probably be at the defendant's expense, and on such other terms as would prevent injustice to the plaintiff, but, as no inconvenience has arisen in this case, I should disregard the omission, or allow an amendment if necessary.

I think a judge in chambers has power to set aside on the merits a final judgment signed on

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default of plea. As I think the defendant has shown grounds sufficient, I shall make the order, and provide that the plaintiff may go to trial at next assizes.

Order accordingly.

WARREN v. COTTERELL.

Married Women's Act, 1872—Ejectment—“Separate tort.”

Under the Married Women's Property Act, 1872, a wife may be the sole defendant in an ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the Province.

[April 20, 1872.—*Mr. Dalton.*]

This was an action of ejectment to recover possession of the east half of lot 36, in the first concession of the township of West Zorra.

On the 18th April, and before any appearance was entered,

T. Ferguson obtained a summons calling upon the plaintiff to show cause why the writ of summons herein, and the copy and service thereof should not be set aside with costs on the ground that the sole defendant named in the said writ is a married woman, and that the land in question does not belong to her, but to her husband. He referred to Cole on Ejectment, page 84.

No cause was shown; but as it appeared that the action had been commenced after the passing of the Married Women's Property Act, 1872 (35 Vict. cap. 16, O.), judgment was reserved, for the purpose of considering the effect of that statute. On the 20th April, judgment was delivered by

Mr. DALTON.—The facts of this case seem to be that the sole defendant is a married woman, whose husband has gone to reside permanently in the State of Michigan. The motion is to set aside the writ of ejectment, copy and service, because the husband is not joined as a defendant. The wife is, in fact, “the person in possession,” and the motion is not grounded on a denial of this, but on the alleged necessity that the husband should be joined in an action against the wife. As to the necessity of this, in ordinary cases there can be no question; but

whether it applies to ejectment may perhaps be doubtful, from the peculiar nature and object of the action. In ordinary actions it has hitherto been applicable, even to this extent, that where she is sued for her own separate debt, and does not defend, a judgment signed against her alone will be set aside.

No cause having been shown by the plaintiff to this summons, it does not appear how or when the present defendant acquired possession, and I am not aware of any case under our Ejectment Act in which this question has arisen except one in Chambers some months ago, where I set aside the process on account of the non-joinder of the husband. Under the old Ejectment Act, the point could never have arisen, and in practice the difficulty is lessened by the fact that where the husband is permanently resident abroad, service may be made upon the wife for him (Tidd's Prac. 9th Ed. 1210-1). Here the wife, and not the husband, is the person in possession, and the plea of non-joinder would be a plea in abatement.

In the action of ejectment, which is unlike any other, the defendant is in possession of the specific land sought to be recovered, and the plaintiff by his writ, alleges that possession to be unlawful. Can the defendant in such a case merely set up matter in abatement, and offer no defence on the merits? Can he say, as this defendant practically does, “This may indeed be your land, but you cannot sue me for its recovery?” It seems an extraordinary thing that a person can retain possession in person of the land of another, and yet, even while standing upon it, deny the right of the owner to pursue his legal remedy without joining some one else—who is not in possession, and is, in fact, out of the country.

In *Bissill v. Williamson*, 7 H. & N. 395, Baron Bramwell says, “In an action of ejectment there never can be any proceeding analogous to a plea in abatement; for the plaintiff in his writ says, I am entitled to possession, and therefore matter in abatement can be no reason for defendant holding the land.” The form of action which bears the strongest analogy to ejectment is replevin, in which one man claims and another defends possession of a specific chattel. In this action no plea in abatement is allowed, unless it alleges matter which gives the defendant a title to the return of the chattel (Gilbert on Distress, 146). In ejectment the possession is not, indeed, given to the plaintiff, as is the case-

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in replevin, where "the deliverance of the goods is immediate, so that the plaintiff hath possession before the defendant can plead thereto." (Gilbert, *loc. cit.*) ; but both forms of action being for the recovery of a specific thing, are in this respect identical. The Married Women's Property Act, 1872, meets the case exactly, section 9 providing that "any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or *torts*, as if she were unmarried." Now the tort here complained of is the unlawful possession of this land, which possession is held by the wife alone. This is therefore her "separate tort;" and the action having been commenced since the passing of the statute, I think the application must fail.

Summons discharged without costs.

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*Municipal Law—Property Qualification—Occupant.**Construction of Statute.*

A person having the mere possession of a lot vested in the Crown, determinable at any moment, has not such an estate in it as will qualify him under the Municipal Act; but he is nevertheless rightly assessed, under 32 Vict. cap. 36, sec. 9, ss. 2 O.

A lot was assessed thus:—"No. 25, H. B., Yeoman, &c," under the head "name of taxable party," and then under the heading "name and address of the owner, where the party named in column 2 is not the owner," appeared the name of the respondent. His name was not bracketed with that of H. B., nor was it stated in any way to be a separate assessment. Held, that the roll shewed that the respondent was assessed for this lot and could qualify upon it.

[April 30, 1872,—*Mr. Dalton.*]

The relator complained that the respondent, who claimed to be the Reeve of Tyendinaga, was not entitled to hold the office, on the ground that he had not the necessary property qualification. He was assessed on Lot 24, Con. A, Tyendinaga, as house-holder, and on Lot 40, in Con. 48, as a freeholder. Lot 24 was part of the Indian Reserve, and the respondent, being Indian agent, was allowed, in addition to his salary, to occupy this lot. The land was held by the Crown in trust for the Indians, and the respondent had possession deter-

minable at any moment. As to Lot 40, he owned the fee, but had a tenant in possession. The assessment of this lot was as follows:—

Name of taxable party—

No. on Roll.	Name of Taxable Party.	Occupation.	H. or F.	Age.	Name of Owner, &c.	School Section.
25	Bowen, H'y	Yeoman.		23	Well'gton Frizell	14

As to Lot 24, it was contended that the respondent was not the legal or equitable owner, proprietor or tenant.

As to Lot 40, it was urged that by the assessment as above set out, the names not having been bracketed, and there only being one number, the respondent was not rated in his own name on the last revised assessment roll, as required by 29, 30 Vict., cap. 51, section 21, and 32 Vict., cap. 36, sched. B, O.

C. S. Patterson, for the respondent.

R. A. Harrison, Q.C., for the relator.

MR. DALTON.—As to Lot 24, Con. 4, Tyendinaga,—the defendant has in my opinion no property qualification in respect of it.

There is, I believe, in this case, no one fact in dispute, and Mr. Frizell himself gives this account of his occupation of this land. It is Indian land vested in the Crown for the benefit of the Indians, and he, being Indian agent in that district, is allowed besides his income otherwise, to occupy this land, which he has accordingly occupied for nearly two years—not for any public use or purpose, but for his private advantage—the use of the land being given to him by the Indian Department, as a part of his salary in fact. I think the assessment against Mr. Frizell in respect of this lot was right, so as to bind him personally, but not the land, under sec. 9, sub-sec. 2, of the last Assessment Act, for he was in occupation for his own interest and advantage. But the assessment cannot qualify him, for he had not at the time of the election, as proprietor or tenant, a legal or equitable freehold or leasehold. He had no estate whatever, but a mere possession, which might be determined in an hour. See *White v. Bayley*, 10 C. B. N. S. 227 and *Mayhew v. Suttle*, 4 E. & B., 347, 357.

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As to the other lot, no. 40—the defendant is the owner in fee simple. It was in possession of a tenant at the time of the assessment. The amount of the assessment is sufficient, and the only question is, whether in point of form the assessment on the roll, if it be an assessment at all, is a sufficient rating under sec. 70 to qualify the defendant. Whether it is sufficient to render him liable for the taxes is, I suppose, the same question. It is singular that the form which is given in the Ontario Statute, 32 Vict., schedule B, is not followed—a thing so easy to be done. By the 26th sec. of 32 Vict. it is provided: “When land is assessed against both the owner and occupant, or owner and tenant (as is the case here), the assessor shall place both names within brackets on the roll, and shall write opposite the name of the owner the letter F, and opposite the name of the occupant or tenant the letter H or T, and both names shall be numbered on the Roll.” This direction has not been followed here. It is in this way:—“No. 25, —Bowen, Henry—Yeoman—H.—(aged) 38”—then under the heading “Name and address of the owner where the party named in column 2 is not the owner,” “William Frizell.” The name of the defendant is not set down under that of Henry Bowen and bracketed with it, nor is the assessment against the defendant separately numbered on the roll. Some other deviations from the proper statutory form will be observed. The defendant’s name, however, is written in a column embraced by the general heading “Names of taxable parties,” and that it was so written for the purpose of assessing him, is known from the other facts. Are these deviations then so essential as to render the assessment void? After examining the English cases and our own, as far as I have referred to, or have been able to find them, I have come to the conclusion that the assessment is good. It would certainly seem an extraordinary thing, considering the class that assessors must necessarily come from, that variances from the form of the assessment should vitiate it. Suppose all the numbers of the assessments were left out for instance, must the municipality lose the taxes?

In *Cole v. Green*, 6 M. & G., 872; by a Paying and Lighting Act, Commissioners were empowered to enter into contracts: “Provided that no such contract should be made for a longer term than three years, and before any such contract should be entered into, ten days’ public notice should be given, in order that

persons willing to undertake the same might make proposals to the Commissioners, at a time and place in such notice to be specified; and all such contracts should specify the works to be done and the prices to be paid for the same, and the times when they should be completed, with the penalties to be incurred in case of non-performance; and the same should be signed by the Commissioners, or by any three of them, or by their clerk, and by the person contracting to do the work; and copies of such contracts should be entered in a book to be kept for that purpose by the clerk.” It was held that the proviso applied to the duration of the contract only, and that the subsequent provisions were not essential, but directory, and that a contract signed, not by the commissioners or their clerk, but by their road surveyor, was not therefore void under the Act.

Then in *Morgan, appellant, v. Parry, respondent*, 17 C. B. 334, it was held that an English Act which required the lists of voters prepared by the overseers to be signed by them, was in that respect directory only, and that a list not signed was nevertheless good. And in *Brunfitt v. Bremner*, 9 C. B. N. S. 1, it was held under the same statute, that the directions to the clerk to sign and deliver the book (the revised list of voters), to the sheriff, “on or before the last day of November,” was not a condition precedent to the validity of the Register (which was not delivered till 13th January).

The cases in 6 M. & G. 872 and 17 C. B. 334, contain a great collection of the English cases on the subject.

There are several cases in our courts where the effects of deviations from the prescribed forms of the statute, in assessments, are considered. I refer to *Applegarth v. Graham*, 7 U. C. C. P., 171; *Reg. ex rel. McGregor v. Ker*, 7 U. C. L. J., 67; *Laughtenborough v. McLean*, 14 U. C. C. P., 175; *DeBlaquiere v. Becker*, 8 U. C. C. P. 167. I think they warrant the conclusion that the enactments as to the form of the assessment (in such particulars at any rate as are here in question), are directory only.

I think the roll in this case does show that the defendant is assessed for Lot 40, and that it is sufficient to charge him, and therefore to qualify him.

Judgment for defendant.

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Application was subsequently made to the Chief Justice of the Common Pleas and to Mr. Justice Galt for a summons to set aside the judgment of Mr. Dalton; but they declined to interfere.

Ross v. McLAY.

Notice of trial before issue—Issue book, service of.

Held, following *Ginger v. Pycroft*, 5 D. & L. 554, that a notice of trial given before issue joined, except under Reg. Gen. 36, is irregular, and, following *McBean v. Duffy*, 4 P. R. 338, that the issue book must be delivered before or with the notice of trial.

[May 13, 1872.—*Mr. Dalton.*]

O'Brien obtained a summons to set aside the issue, issue book, and notice of trial on the grounds that the notice of trial was given before issue joined and before plea pleaded, and that it was given before the issue book was served. It appeared from the affidavits filed that cross-actions of libel were pending between these parties, in both of which the writs were issued on the 18th April, and the declaration filed on the 30th April, 1872. Tuesday, the 7th May, being the last day for pleading, the plaintiff in this case served a notice of trial for the Walkerton Assizes, to commence on the 14th May; but defendant not pleading until the morning of Wednesday, May 8th, issue could not be joined or the issue book made up until that day.

Luton (Paterson, Bain & Paterson) showed cause:—The defendant's time for pleading expired on the 7th, which was also the last day on which notice of trial could be given for the Walkerton Assizes; and the delay in joining issue and serving the issue book was occasioned by his withholding his plea until the next morning. The Court will not suffer him to profit by his own wrong, or give effect to his subterfuge by setting aside the proceedings: *Farrell v. Fagan*, 11 Ir. L. Rep. 76. It has been decided that in such a case the plaintiff may give notice of trial at his own risk: *Lowry v. Robinson*, 11 Ir. L. Rep. 57; *Lindsay v. Dowling*, Ib. 59. As to the service of notice of trial before issue book, see *Carruthers v. Rykert et al.*, 7 U. C. L. J. 184, where Chief Justice Robinson held that a notice of trial is not irregular, although the issue book is not delivered until the following day.

O'Brien, *contra*. The defendant has been guilty of no subterfuge, for the declaration in each of the cross-actions having been filed on the same day, he could have gone to trial as well as the plaintiff, and it is exceedingly desirable that both these cases should be tried at the same time. The plaintiff, however, has proceeded under a mistaken notion as to the practice. Except under the circumstances mentioned in Reg. Gen. Pr. 36, notice of trial cannot be given before issue joined: *Ginger v. Pycroft*, 5 D. & L. 554. The rule of court does not apply here. The case of *Carruthers v. Rykert*, has been overruled by *McBean v. Duffy*, 4 P. R. 338, following *Reeves v. Epps*, 16 U.C.C.P. 137; and the practice is now settled that the issue book should be delivered before or with the notice of trial. He referred also to *Riach et al. v. Hall*, 11 U.C. Q.B. 356, and *Young et al. v. Laird*, 2 P.R. 16.

MR. DALTON.—A perusal of the Irish cases which have been cited shews that the practice there differs materially from ours, which on this point is well settled. The defendant has taken no advantage to which he is not legally entitled. The only question for me is whether issue was joined before the notice was served. It appears it was not; and as the case does not come within the rule of court, I must make the order asked. Costs to be costs to defendant in any event.

Order accordingly.

NORDHEIMER v. SHAW.

34 Vict., cap. 12, sec. 12, O.—*Notice of trial—Computation of time—Ejectment.*

Held, that the “two clear additional days to the time now allowed by law” for service on the agent of a country attorney, under the above statute, means the insertion of two days between the day of service and the day of the happening of the event to which the notice relates. A service of notice of trial on the Toronto agent of a country attorney on Saturday for Monday week would be sufficient.

[June 4, 1872.—*Mr. Dalton—Galt, J.*]

Ejectment—The plaintiff obtained a summons, calling on the defendant, his attorney or agent, to show cause why the order changing the attorney for the defendant, herein made on the 29th day of December, 1871, should not be

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rescinded, and the service thereof, and the notice limiting the defence, and the service thereof, should not be set aside with costs, on the ground that the said order was not obtained, and the change of attorney was not made *bona fide*, but as a tricky abuse of the practice of the Court, for the purpose of throwing the plaintiff over the next Toronto assizes, and that the said notice is only given for the same reason and on grounds disclosed in the affidavits and papers filed; or why the plaintiff should not be at liberty to amend his issue book served herein by adding thereto the notice limiting the defence, or to serve a new issue book without prejudice to the notice of trial served for the next Assizes, which should stand good on the ground that the said notice was given after the service of an issue book and notice of trial, and on grounds disclosed in the affidavits and papers filed on obtaining the said order changing the attorney.

The writ in this case was issued on the 9th December 1871. On the 11th, service was accepted by Mr. R., defendant's attorney, and on the 27th he appeared, and by his notice claimed all the land described in the writ. The next day the plaintiff served issue book and notice of trial. On the evening of the day after (29th December), a clerk in the firm of M. & B. served the plaintiff's attorney with an order made that day, changing the attorney from Mr. R. to a Mr. W., and a notice limiting the defence to a part of the land claimed. The next day the plaintiff's attorney inquired of M. & B. who Mr. W. was, and was told that they did not know, as they had served the papers for S. R. & M., in whose office the papers served, and the affidavits on which founded had been prepared. Mr. R. was the booked agent for Mr. W.

C. S. Patterson (instructed by Mr. R.) shewed cause, and filed an affidavit of the latter, stating that the notice limiting the defence was given in good faith, and for the purpose of limiting the defence to about seven or eight acres out of twenty or thirty claimed in the writ, and being all the premises of which the defendant had possession and for which he intended to defend.

Hector Cameron supported the summons.

Several points were touched upon on the argument, but it is only material here to refer to that upon which the case was decided, viz., as to the meaning of the words "two clear ad-

ditional days to the time now allowed by law for such service shall be added," given in the 34 Vict., cap 12, sec. 12, when papers are served on the Toronto agent of an attorney residing in the country.

The following authorities were cited: *Morell v. Wilmott*, 20 U.C.C.P. 378; *Vrooman v. Vrooman*, 17 U. C. C. P. 523; *Phillips v. Winters*, 3 P. R. 312, 10 U. C. L. J. 161; *Buchanan v. Bettes, et al.*, 2 U. C. L. J. N. S. 71; *Harrison v. Cant*, 3 F. & F. 277; *Grimshawe v. White*, 12 U. C. C. P., 521; *Ikin v. Plevin*, 5 Dowl. 594; *Blake v. Done*, 7 H. & N. 465; *Chadsey v. Ransom*, 17 U. C. C. P. 629; 34 Vict., ch. 12, sec. 12, O.; C. L. P. Act, sec. 222; *Eject. Act*, secs. 8, 12.

MR. DALTON.—The only ground upon which the plaintiff can complain of the matter alleged, must necessarily include injury to himself. Under proper circumstances all the acts done the defendant had a right to do, but the plaintiff objects to the alleged motive for the acts, the time and manner of doing them, and the intention with which they were done, viz., to gain by indirect means an advantage over him, which he alleges is an abuse of the practice was. The first question, therefore, is, has the plaintiff suffered any embarrassment from the acts complained of.

The defendant's notice limiting his defence was served on Friday. That would render necessary the delivery of an amended issue, and new notice of trial, and I will suppose an application in Chambers. So that the morning of Saturday was the earliest time that these steps could be taken. Would that have enabled the plaintiff to get down to trial by Monday, for the following Monday is a good notice of trial, when served on the attorney—not on his agent in Toronto.

Sec. 12 of 34 Vict., cap. 12, enacts that when served upon the agent of the attorney in the cause in Toronto "two clear additional days to the time now allowed by the law for such service shall be added."

The expression "clear days" when applied to the time for a notice, is very well understood. It means the days included between the day of service, and the day for the performance of the act, or the happening of the event, to which the notice relates—in common terms the first and last days are both excluded. This is the mean-

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NORDHEIMER V. SHAW—MOFFATT V. EVANS.

[C. L. Cham.]

ing of the term "clear days," and it is the only meaning.

Now Monday for Monday is *six* clear days—Saturday for Monday week next following is *eight* clear days. Then would not the service in this case on the Toronto agent of defendant's attorney have given the two clear additional days which the statute prescribes? I think it would.

The use of the word "clear" in the statute is unfortunate. In *lengthening* a notice, it is not possible to add days, which are not clear days, for there are already in the original notice a first and a last day, and there are no more in the lengthened notice, so that the added days must be clear days.

If I am right in this construction of the statute, *both* parties were, I think, in error in supposing that a service on Saturday would have been insufficient.

I think under the circumstances of the case the summons should be discharged without costs.

Summons discharged without costs.

From this judgment the plaintiff appealed by summons to a judge, which came on for hearing before Mr. Justice Galt, when

C. S. Patterson shewed cause.

Osler, contra.

GALT, J.—I felt some doubt upon the point decided by Mr. Dalton, but after consideration, I think the view he takes is the correct one. The question of the *bond sides* of the defendant's attorney does not properly come before me on this summons. I am not, therefore, called upon to make any remark on the circumstances which are detailed by the plaintiff to set aside the proceedings of the defendant on the ground of trickery.

*Appeal disallowed.**

MOFFATT V. EVANS.

34 Vict. cap. 12, sec. 12, O.—*Service on Toronto Agent—Notice to plead.*

A notice to plead, when served on the Toronto agent of a country attorney, must demand a plea within ten days. A notice to plead which does not truly set out the time within which defendant must plead, before plaintiff can take his next step, is irregular.

The obscurity of the above enactment remarked upon.

[October 24, 1872.—*Mr. Dalton.*]

J. K. Kerr obtained a summons calling on the plaintiff, his attorney, or agent, to shew cause why the notice to plead, served in this case, should not be set aside for irregularity, on the ground that the declaration and the notice to plead were served upon the Toronto agent of the defendant's attorney, and the defendant was therefore entitled to ten days to plead, instead of eight days, the time within which the notice served required the defendant to plead; and also to shew cause why the venue in this case should not be changed from the County of Wellington to the County of Halton.

Osler shewed cause. The summons as far as it relates to the notice to plead is grounded on 34 Vict. cap. 12, section 12, O., which reads as follows:—"In all cases where pleadings, or notices of trial, or countermand of notice of trial, in either of the Superior Courts of Common Law, or in the County Court, are served upon the agent of the attorney in the cause in Toronto, two clear additional days to the time now allowed by law for such service shall be allowed." Under this section it is not necessary in the notice to call upon defendants to plead within ten days. The statute does not apply to the form of the notice but merely to the time within which to plead. It is not enacted that ten days' notice is to be given, but that two days' time shall be added.

J. K. Kerr, contra. The section evidently means that two days are to be added to the time within which any pleading, &c., may be served, so as to avoid judgment by default. If the plaintiff were to give notice to plead in four days, it would clearly be irregular, and so as ten days are allowed, a notice only giving eight days is also irregular. The parties are entitled to a ten days notice, and this being only for eight days is irregular.

* See the next case.—REP.

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MOFFATT v. EVANS—IN RE LIVINGSTONE.

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MR. DALTON.—The language of sec. 12 of 34 Vict. cap. 12, is singularly inappropriate for the purpose intended. Every one is aware that the intention of the clause, as to pleadings, was to give the opposing party two clear days further time for his answer to any pleading, where it is served on the agent of the attorney in the cause at Toronto, beyond the time to which he would be entitled, had it been served directly upon the attorney himself. It needs such knowledge indeed, however derived, to find in the language used that such is the enactment. The words are: “Two clear additional days to the time now allowed by law for such service shall be added.” Allowed to whom? and for what? It cannot be to the party pleading. A year is allowed by law for a party to declare, and for the pleadings after the declaration there is no limit whatever. It would be absurd then to think that two additional days are given to that party; and there is no use or purpose which can be supposed for the two additional days, unless they be added to the time which the opponent has to answer. To him they must be understood to be *allowed* as added to the time within which the party pleading can compel an answer to that pleading. The association of pleadings with notice of trial and notice of countermand argues this. But pleadings only are mentioned in the clause, which do not necessarily include notices to plead, reply, rejoin, &c. That has arisen doubtless from the common practice of serving the notice to answer with the pleading itself, which, however, is not necessarily nor always so. Then assuming that the *pleading* must be *served* ten days before you can compel an answer, it does not follow that the notice will be always subject to the same rule, but it must be where the pleading and notice are served together, for if the above construction be right, an answer cannot be compelled till ten days after the service of the pleading.

I at first thought that a notice served on the agent might be in the usual form of eight days, though ten days must be allowed to elapse after the service, before judgment could be signed; but I cannot, on consideration, escape from the conclusion, that at least the whole time allowed by law must be mentioned in the notice. For why is any time mentioned at all, unless it be the true time; the only purpose is to give information; it may be more than the time allowed by law, the effect of which would be to give such further time, but it cannot regularly be less. The service on the agent is good service

and the time mentioned in the notice must be reckoned from the time of such service. No other commencement can be supposed, and therefore to require the opponent to answer in eight days is to take from him the time which the statute gives.

I think then that the word “allowed” in the clause is used in the sense that the two days are to be added to the time which the opposite party has to answer, and that where the notice to answer is served, as here, with the pleading on the Toronto age the notice must be to answer in ten days.

Order accordingly.

IN RE LIVINGSTONE.

Conviction for being drunk on public street.

A person was convicted of being drunk on a public street, contrary to law, and adjudged to pay a fine of \$50 and costs, or to be imprisoned for six months at hard labour. There was a power given by by-law 478 of the City of Toronto to imprison an offender for the above offence, but in the warrant of commitment no reference whatever was made to the by-law.'

Held, that as there is no common law right to imprison any one for being drunk on a public street, and the by-law not having been referred to, the conviction was bad.

[March, 28, 1872.—*Hagarty, C. J. C. P.*]

Osler, on behalf of the prisoner, moved to quash a conviction. The conviction stated that “On the 31st day of January, A. D. 1872, a complaint was made before Alexander MacNabb, Police Magistrate in and for the City of Toronto, for that John Livingstone, late of the said City of Toronto, was, contrary to law, drunk on a public street, to wit, on Wellington Street, in said City of Toronto.” For this offence the defendant was adjudged to pay \$50 fine and \$3 costs, to be levied by distress, and in default to be imprisoned six months in gaol at hard labour, unless sooner paid, &c. After averring non-payment and no distress, defendant was committed for six months at hard labour, until and unless the said sum and \$25 extra costs be paid, &c.

J. G. Scott appeared for the Crown.

HAGARTY, C. J.—This conviction is not for offence by statute law, but is said to be under a by-law No. 478 of the City, passed under sec.

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284 of the Municipal Act of 1866, sub-sec. 8, for punishing persons found drunk or disorderly in any street or byway.

No reference whatever is made in the conviction to any by-law.

Sec. 362 gives a form of conviction for an offence under a by-law, dispensing with certain formalities, but giving a form shewing the offence to be "contrary to a certain by-law of the Municipality of _____ passed on the ____ day of ____" reciting the title of the by-law.

I think this conviction cannot be supported.

It seems strange that the offence of being drunk on a public street without violence or disorderly conduct should be visited with six months imprisonment under a local by-law, when the Statute law (32-33 Vict. cap. 28) limits the imprisonment to two months in the case of persons causing a disturbance in the street by screaming, swearing, or singing, or being drunk, or impeding passengers.

There may be other objections to this conviction if scanned closely, but it seems certainly bad on the grounds above stated.

Conviction quashed.

IN RE B. & S., Attorneys, &c.

Attorney and client—Taxation—Substituted bill.

On an application to refer an attorney's bill to taxation, an amended bill of costs was allowed to be substituted for the bill delivered to the client; the attorneys undertaking to receive in full of their fees, charges, &c., the amount of the original bill, or the amended bill as taxed, whichever might be the least.

[November 28, 1872.—*Mr. Dalton.*]

A summons was obtained to tax the attorney's bill of costs for services in four interpleader suits.

Stephens shewed cause, and asked leave to substitute another bill, which, though for a larger amount, was only an amplification and giving more detailed statements of the same charges as were in the original bill. The original bill was not delivered for the purposes of taxation, but as shewing the amount which the attorneys were willing to accept as a cash payment.

O'Brien, contra, contended that the bill delivered must be the one referred to taxation, citing *Re S. & M.*, 8 C. L. J. 245, and cases there referred to.

MR. DALTON.—I think the proper order to make under the circumstances would be to refer the substituted bill to taxation, upon the attorney's undertaking to accept such sum as it may be taxed at, or the amount of the original bill, whichever may be the least. It would often be inequitable to compel attorneys to have incomplete or defective bills referred to taxation.

Order accordingly.

MC DONALD V. McEWAN.

Practice in pleading—Further time to plead.

Held, that when further time to plead is allowed by order, made after the original time for pleading has expired the extra time is to be computed from the date of the order, and not from the expiration of the original time allowed by law.

[December 31, 1872.—*Mr. Dalton.*]

Alexander Cameron moved absolute a summons to set aside an interlocutory judgment signed for want of a plea on the ground that it was premature. The original time for pleading expired on the 11th of December. On the same day a summons for one week's further time was taken out by the defendant, which was enlarged at the request of plaintiff until the 14th December, when the summons was made absolute. Judgment was signed by the plaintiff for want of a plea on the 20th December, nine days after the expiration of the original time and six days from the date of the order. He contended that the word "further" used in the order must be construed as meaning that the extra time was to be computed from the date of the order; that the enlargements of the summons operated as a stay of proceedings, and consequently that the time for pleading had not expired when judgment was signed.

Mr. Pepler, (Harrison, Osler & Moss,) *contra*, contended that the word "further" must be taken as meaning that the extra week allowed was to be *in addition* to the original time for pleading. He also urged that the fact of the summons being taken out on the last day of the original time went to show that the defendant had this in contemplation when he ob-

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tained the summons, and that it was what he intended. He cited *Lane v. Parsons*, 5 Dowl. P. C., 359, and *Aspinall v. Smith* there referred to.

MR. DALTON. The question is whether the expression "one week's further time to plead" in a judge's order gives such further time from the end of the original time to plead, or from the making of the order—the order being made after the original time had expired. Mr. Cameron contends that the order speaks from its date, as to the computation of time—and secondly, as here there was a stay of proceedings from the return of the summons to the making of the order upon an enlargement moved by the plaintiff, that kept open the time to plead till the order was made, and that the effect is therefore the same whether the date of the order or the end of the original time to plead is taken for the starting point.

I agree with him upon the first ground. It is rather singular that no precise authority is to be found upon the point, at least I cannot find any.

The order is the language of the Judge, and it speaks at least from the making of the order, if not from the time of the argument: *Egan v. Rowley*, 8 D. P. C. 145. No doubt outside facts must often be looked at to find its application, but the construction must still be on the words contained in it. If the original time for pleading has not expired, an order for "further" time means further beyond the original time, because there, to give meaning to the word "further," it is supposed that the order is made with knowledge of the state of facts and in contemplation of the time which has then yet to elapse. If in such circumstances it is simply for "time" it is for time from the making without reference to the unexpired original time of the order, be-

cause *prima facie* the order speaks from its date, and there is nothing in the facts when looked at to show distinctly that any other terminus a quo is meant. But it speaks from its date as much in the first case as in the last.

When the order is made after the time for pleading has expired I cannot see from what point "further" extends if it be not from the making of the order. *Prima facie* it is from the making of the order, and what countervailing reasoning is there to show that the end of the original time for pleading is to be taken instead. It must, I should say, be supposed that the Judge had all the facts before him and arrived at his decision upon a knowledge of them all—and if he then says a week's time—must he not rather be supposed to mean a week from the time when he is speaking, than a week to commence from some former day. Suppose a month had elapsed since the original time had expired, and he gives a week's further time, what then could it mean?

There is nothing here, it seems to me, to alter the *prima facie* meaning, which is that the week runs from the date of the order.

There is a suggestion in Lush's Practice, adverse to my view, which is all that I can find upon the point anywhere, but the case there referred to seems to contradict the opinion in the text.

The point may be said to be doubtful, but the course has been advisedly taken to gain an advantage. The plaintiff intends, if he can, to hold that advantage, and puts it upon the question who is right.

I think therefore the judgment and all subsequent proceedings should be set aside with costs.

Order accordingly.

PRACTICE COURT.

PACAUD V. McEWAN.

Rescinding rule for new trial for non-payment of costs.

The defendant had obtained a rule a year previously for a new trial on payment of costs. He neglected to pay the costs and the plaintiff obtained a rule *nisi* to rescind the rule for new trial. *Held*, that if the defendant should pay the costs of the trial, as provided by the original rule for new trial, and of this application within ten days, the rule *nisi* should be discharged, otherwise that the rule for new trial should be rescinded.

[Michaelmas Term, 1872.—*Galt, J.*]

Burton, Q. C., obtained a rule calling upon the defendant to show cause why his rule for a new trial in this cause granted in Easter Term, 34 Vict., on payment of costs by the defendant, should not be rescinded on the ground that the defendant had made default in paying such costs. This rule was by consent of counsel enlarged to be argued in Chambers.

Osler shewed cause and called attention to the judgment of the Court of Queen's Bench, reported in 31 U. C. Q. B. 328, to show that the plaintiff was not under any circumstances entitled to recover more than nominal damages. The damages recovered were upwards of \$800. It was admitted that he had no valid excuse to offer why the costs had not been paid; it was simply

an oversight on the part of the defendant's attorney.

W. S. Smith supported the rule, citing *Grantham v. Powell*, 1 P. R. 256; *Rabidon v. Harkin* 2 P. R. 129; *Van Every v. Drake*, 3 P. R. 84; *Lyman v. Snarr*, 3 P. R. 86.

GALT, J.—I should have been surprised to find that the decisions had so settled the practice in cases like the present that I should have been under the necessity of rescinding the rule for a new trial in this case, and to have permitted the plaintiff to retain a verdict for a considerable sum of money, when the Court of Queen's Bench has decided that at the most he is entitled to nominal damages only. But on looking at the cases referred to by the learned counsel for the plaintiff I see that in every one of them the Court refused to rescind the original rule. Under the circumstances of this case I think the defendant should pay the costs of this application.

I therefore order that upon the defendant paying the costs of the former trial, as provided by the original order for a new trial, and also the costs of this application, within ten days, that this rule shall be discharged, otherwise, that the same shall be made absolute.

Rule accordingly.

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RE L. & M. (Solicitors.)

[Chy. Cham.]

CHANCERY CHAMBERS.

RE L. & M. (Solicitors).

Solicitors—Summary jurisdiction—Liability of surviving members of one firm to account to surviving member of another firm of which their deceased partner had also been a member—Jurisdiction of the Referee.

The Referee has no power to exercise summary jurisdiction over Solicitors; such jurisdiction can only be exercised on an application to the Court.

Sensible, when one member of a firm of Solicitors has died, the summary jurisdiction of the Court can no longer be exercised over the survivors, because such an application may necessitate the taking of the partnership accounts, and the representatives of the deceased partner are necessary parties.

[Jan. 10, 1873.—*Referee in Chambers.—Strong, V.C.]*

This was a petition presented by Mr. John Bell, a solicitor, against Messrs. A. W. Lauder and W. Mulock, surviving partners of Ross, Lauder & Mulock, a firm of solicitors.

The petition stated that the petitioner was solicitor for the plaintiff in a suit of *Gilmour v. Meyers*, pending in this Court from the commencement of said suit until 22nd October, 1865, when the firm of Ross, Lauder & Patteson, of which firm the said A. W. Lauder was a member, became solicitors for the plaintiffs. During the time the petitioner was solicitor in *Gilmour v. Meyers*, the said Lauder, and subsequently the firm of Lauder & Mulock, were the Toronto agents of the petitioner. That the sum of \$1,263.13 was due to the petitioner for taxed costs in the suit of *Gilmour v. Meyers*. The respondents had received the said sum from Mr. Gilmour the plaintiff, for the purpose of paying the same to the petitioner, but that they had not paid the same to the petitioner although requested so to do. That the respondents claimed to have a contra claim against the petitioner for \$500, for agency services, which claim however the petitioner alleged was paid.

In support of the petition the petitioner filed the affidavit of W. G. Cassels, one of his Toronto agents, proving the amount due, in respect of the costs claimed by petitioner, and verifying a correspondence between the firm of which he

was a member and the respondent's solicitors, with a view to referring the matters in difference to arbitration.

He also relied on the report of the Master made in another matter, *Re Lauder & Mulock*, wherein Gilmour had been a petitioner, and in which the Master had found as follows :

"I find specially that besides the sums in the preceding paragraph mentioned, the said solicitors received a sum of \$2,228.71, being the proceeds of a draft by Ross, Lauder & Mulock, upon Messrs. Gilmour & Company, dated 11th July, 1868, payable to the order of the Hon. John Ross, then a member of the firm of R. L. & M., and also of the firm of Ross & Bell, by whom the bill of complaint in *Gilmour v. Meyers* had been filed. The said amount was received by the said Ross in full of the balance of the costs taxed to the plaintiff up to the report in the said suit. The report in the said suit bears date the 1st day of February, 1867, and therein the costs of the plaintiff, who is also the petitioner herein, appear to be taxed at the sum of \$3,672.19. The bill in the said suit was filed on the 23rd of October, 1860, by Ross & Bell, as solicitors for the plaintiff, and by the order of the 22nd of February, 1865, the plaintiff's solicitor was changed to T. C. Patteson, then a member of the firm of Ross, Lauder & Patteson. The costs taxed upon the present reference have been the costs of the said suit of *Gilmour v. Meyers*, between solicitor and client, beginning from the 22nd of February, 1865, aforesaid, being the time when the said A. W. Lauder first became one of the solicitors of the said petitioner, and I find that the said sum of \$2,228.71 was paid to the said John Ross, now deceased, in respect of costs taxed between party and party in the said suit incurred prior to the said 22nd of February, 1865, and I certify that in the absence of the representatives of the said John Ross and of John Bell, the surviving partner of the said firm of Ross & Bell, upon this reference I am unable to determine the sum properly paid to the said John Ross, as representing the firm of Ross & Bell, and therefore unable to ascertain for how much of the said

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Re L. & M. (Solicitors).

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sum of \$2,228.71, the said solicitors, Lauder & Mulock, are accountable to the said petitioner. And I further certify that the costs taxed in the suit of *Gilmour v. Meyers*, up to report as aforesaid, have been greatly reduced upon the present taxation between solicitor and client, and cannot be relied upon as shewing the proper amount of party and party costs payable to the said firm of Ross & Bell, and to be deducted out of the said sum of \$2,228.71."

The petitioner also relied on the oral depositions of Mr. Lauder, and the entries in the books of account of the firm of Ross, Lauder & Mulock, from which it appeared that Mr. Ross had communicated to him (L.) his intention to draw on Messrs. Gilmour for the costs in question. That the amount received by Mr. Ross on the draft was credited to Messrs. Gilmour and debited to Mr. Ross in the partnership books, but no credit was ever given to Mr. Ross for the amount of the costs due to Ross & Bell. It also appeared that the costs of the suit of *Gilmour v. Meyers*, up to 22nd of February, 1865, had been reduced on retaxation between solicitor and client to the sum of \$1,263, and that Mr. Lauder had refunded to Mr. Gilmour the difference between that sum and the \$2,228.71 received on the draft. Mr. Lauder also identified an account of agency services unconnected with the suit of *Gilmour v. Meyers*, amounting to \$574.73, in the margin of which was the following memorandum:—

"Costs \$1,263 13
574 73
<hr/>
\$688 40"

Which he had rendered to the petitioner.

In answer, the respondents filed affidavits of Mr. Lauder, from which the following facts appeared: that Lauder had entered into partnership with Mr. Ross in October, 1863, and continued in partnership with him till his death in February, 1871. That the firm consisted at first of Ross, Lauder & Patteson, afterwards of Ross & Lauder, and finally, until Mr. Ross's death, of Ross, Lauder & Mulock. That while Mr. Lauder was so in partnership with Mr. Ross, Mr. Ross also had a law firm in Belleville of which the petitioner was a partner. That Mr. Ross personally collected and received from Gilmour the said \$2,228.71, and that he never paid any portion of the said sum to Lauder, or into the hands of the firm of R. L. & M. That he was not aware of what arrangement Mr. Ross had made with Mr. Bell as to the costs earned by Ross & Bell.

That upon being informed of the receipt of the money by Mr. Bell, he had made the entries in the books of the firm of R. L. & M. That Lauder had understood that Mr. Ross had received the \$2,228.71, because he was a member of both firms. He denied any agency or professional relationship to have existed between Mr. Bell and the firm of Ross, Lauder & Mulock, in respect of the suit of *Gilmour v. Meyers*, and he denied all knowledge as to whether the accounts between Ross & Bell had ever been settled, and whether or not Mr. Bell was entitled to the costs earned by Ross & Bell in *Gilmour v. Meyers*, he also stated that the accounts between Lauder & Ross had not been settled, and that he (Lauder) claimed a balance to be due from Ross.

It also appeared that on Mr. Mulock's retirement from the firm, Mr. Lauder had agreed to indemnify him against all further claims.

In reply the petitioner tendered the affidavits of the petitioners and James Ross, (a brother of the late John Ross,) to establish, first, that the late Hon. J. Ross, had ceased to have any beneficial interest in the firm of Ross & Bell, in 1852, that though his name was subsequently continued in the firm he was only a nominal partner, and that until the year 1863 the petitioner was solely interested in the firm of R. & B., that in the year 1863 the firm was changed to Bell & Crombie, and continued so until 1865, when that firm was dissolved, and the firm of Ross, Bell & Holden was formed. Second, that when he handed the suit of *Gilmour v. Meyers* over to R. L & P. he informed Mr. Lauder, and the latter knew that he Bell was solely interested in the costs incurred in *Gilmour v. Meyers* up to that time. Third, that neither Mr. Ross, nor Ross & Bell had ever received any credit in the books of Ross Lauder & Mulock for the \$2,228.71 costs received by Ross, Lauder & Mulock, but that Mr. Ross had been debited with that sum by the firm of R. L. & M. as a portion of the moneys coming to him as a member of that firm.

The respondents' counsel objected to the reception of these affidavits, and they were read subject to the objection, as was also the petitioners' cross-examination on these affidavits. From the cross-examination of Mr. Bell it appeared that no formal notice had ever been given by him to the firm of Ross, Lauder & Patteson as to his being solely interested in the costs in question, and he appeared to base his statement as to Lauder's knowing that Ross was a nominal partner of the firm of R. & B. on conversations had with him whilst a student in the office of

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Ross, Crawford & Crombie, and before and after he had become a partner of Ross.

On the 23rd December, 1872, the petition came on before the Referee for argument.

J. A. Boyd, for the petitioner. The receipt by Ross bound all the members of the firm and all are equally liable ; there was no concealment on the part of Ross, on the contrary, his intention to draw upon Gilmour was communicated to his partners and approved by them, and the transaction duly entered in the partnership books. Under such circumstances all the partners are equally liable, even though one actually received the whole of the money, for it is clear he did so with the others' consent : *Moore v. Smith*, 14 Beav. 393 ; *Brydges v. Branfill*, 12 Sim. 389 ; *Willett v. Chambers*, Cwop. 814. The respondent Lauder has admitted his liability by refunding the amount to Gilmour which was overpaid by him, also by the entries in the partnership books, and by the account rendered by him to the petitioner. It is not necessary to give the Court jurisdiction that the relationship of solicitor and client should exist, it is sufficient if it be shewn that there has been a receipt in a professional capacity of money to which another is entitled. Here the firm of Ross, Lauder & Mulock received the money in consequence of their having been substituted for Mr. Bell as plaintiff's solicitors : *Re Walker*, 2 Chy. Ch. 324 ; *Re Carroll*, Ib. 323 ; *Re Toms*, 3 Chy. Ch. 41 ; *Re Davis*, 1 W. N. 321. He also referred to *Clifford v. Turrell*, 12 Jur. 428 ; *Wragg v. Denham*, 2 Y. & C. (Ex.) 117 ; *Pritchard v. Shuttleworth*, 4 Ir. C. L. R. 233 ; *Cormack v. Beisly*, 3 De G. & J. 157 ; *Hanson v. Reece*, 3 Jur. N. S. 1204.

Macleman, Q. C., for respondent Lauder. The Court has no jurisdiction here assuming the petitioner to have been entitled to the costs in question. Gilmour has wrongly paid the amount to Ross, Lauder & Mulock ; Bell has no right of action against the latter firm, his remedy is against Gilmour.

The Master's report in *Re Lauder & Mulock*, shows the money was paid to Ross as a member of the firm of Ross & Bell, and Ross was, as a member of that firm, entitled to receive the money. The affidavits of Bell and Ross in reply are in conflict with these statements in the report, and ought not to be received, as they in effect set up a new case. There has been no admission of liability by Lauder to Bell, what-

ever there may have been to Gilmour, and there are no entries in the books in Bell's favour. There is no proof that Ross has not settled with Bell for these costs. Crombie should have been a party to these proceedings ; as the suit was carried on for a year by Bell & Crombie.

But it is settled that it is only in cases of actual misconduct that the Court will exercise summary jurisdiction over solicitors ; and even then, only at the instance of one standing in the relationship of a client to the solicitor : *Re Hill*, L. R. 3 Q. B. 543, judgment of Blackburn, J., p. 547 ; *Re Hamilton O'Reilly*, 2 P. R. 198.

Ross was at any rate primarily liable, and this application cannot succeed because, in the absence of his representatives, complete justice cannot be done.

C. Moss, for Mulock, submitted to such order as might be made, but asked that it might be directed to be first enforced against Mr. Lauder, to which the petitioner's counsel assented.

J. A. Boyd, in reply. The Master's report is not conclusive in its statements ; it appears, on its face, to have been made in the absence of Bell. Now the whole facts are brought out, it is clear the payment made by Gilmour to Ross was not made to him as a member of the firm of R. & B., but (as the petitioner contends) as a partner of R. L. & M. That fact is clear both from the entries in the partnership books, and Lauder's own depositions.

It is not necessary that there should be any privity between the applicant and the solicitors, in order to found an application of this kind : *Robbins v. Fennell*, 11 Q. B. 255 ; *Re Robbins v. Heath*, Ib. 259 ; *Re Taylor*, 1 C. L. J. 300 ; *Re Ward*, 31 Beav. 1.

The petitioner is ready to shew that Crombie has no interest in the costs in question, and although the solicitors have no right of set-off (*Hanley v. Cassam*, 10 L. T. 189) the petitioner is willing that there should be a reference as to whether there is any thing due on the contra account of the respondents.

On the 11th of January, 1873, the Referee delivered judgment as follows :

THE REFEREE.—A petition has been presented by Mr. John Bell, a solicitor, praying that the respondents may be ordered to pay him the sum of \$1,263.13, alleged to have come to the hands of the firm of Ross, Lauder & Mulock (of which

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firm the respondents are the surviving partners) and to which moneys petitioner claims to be entitled under the following circumstances.

It appears that Mr. Bell formerly carried on business under the style of Ross & Bell (Mr. Ross being merely a nominal partner), that in the year 1861, whilst so carrying on business, he commenced a suit of *Gilmour v. Meyers*; that he carried on this suit until 22nd of February, 1865, when the suit was transferred by him to the firm of Ross, Lauder & Patteson. The latter firm appears to have been subsequently dissolved, and to have been succeeded by the firm of R. L. & Mulock, to whom the conduct of the suit of *Gilmour v. Meyers* was transferred. (See *Alchin v. Buffalo and Lake Huron Railway Co.*, 2 Chy. Ch. 45.)

The costs of the suit up to the 22nd of February, 1865, were subsequently taxed at \$2,249.56, and on the 13th of July, 1868, Mr. Ross, in the name of the firm of R. L. & M., drew a bill of exchange on Mr. Gilmour for the amount of these costs, payable to his own order, which bill appears to have been duly honoured.

This transaction is entered in the books of the firm of R. L. & M. Mr. Gilmour is credited with the amount paid to Mr. Ross on this acceptance, and Mr. Ross is debited with the amount received by him. I have carefully examined the ledger of R. L. & M., and do not find that Mr. Ross has anywhere in his account been credited with the amount of these costs, as a debt due to him or to the firm of Ross & Bell. It further appears that the amount of the costs, up to the 22nd of February, 1865, were on a subsequent retaxation reduced to the sum of \$1,263, and the difference between that sum and the amount paid to Mr. Ross, was refunded by Mr. Lauder to Mr. Gilmour.

It also appears that lengthy negotiations have been pending between the petitioner and respondent (Lauder) for the settlement of the claim in question on this petition, and that a statement of account was prepared and rendered to Mr. Bell by Mr. Lauder, in which he claims credit for the sum of \$574.73, for agency and other charges; and in the margin of this statement I find, in the same handwriting as the rest of the account is this memorandum :

"Costs \$1,263 93

574 73

\$688 40"

A balance being thus apparently struck between the amounts respectively claimed by the petitioner and respondents from each other.

On the hearing of the petition the learned counsel who appeared for Mr. Lauder objected to the reception of the affidavits of John Bell and James Ross, filed in reply, on the ground that they in effect made out a new case from that stated in the original materials on which the petitioner relied to support his petition, and were in fact, in some particulars, at variance therewith; and before proceeding further it may be well to dispose of this point. I have been unable to see that this objection is well founded. It is true that some of the statements in the Master's report in *Re Lauder & Mulock*, are to the effect that the firm of Ross & Bell were entitled to the money in question, and that it had been paid to Mr. Ross as a member of that firm; but it also appears that those statements were made in the absence of Mr. Bell, that he was no party to the proceeding in which that report was made, and these statements are, I think, also at variance with the depositions of Mr. Lauder himself and the exhibits referred to by him on his examination, which also constitute a part of the petitioner's original case. I therefore decide that the affidavits in question do not set up a new case, and are admissible to meet the case set up by the respondent Lauder.

It was contended on the part of the petitioner that I had no jurisdiction to make the order asked in this matter, because it is said that no privity was shown to exist between the petitioner and the respondent; neither was there any relationship of solicitor and client between them, and without these the Court has no jurisdiction. Furthermore, it was contended that the payment made by Gilmour to R. L. & M. was wrongly made, and that the petitioners' remedy was against Gilmour or Ross's representatives.

I have come to the conclusion that I have jurisdiction. It is clear to me that the moneys in question have been paid to Mr. Ross under such circumstances as to make the firm of R. L. & M. liable for the receipt to the person entitled thereto: *Moore v. Smith*, 14 Beav. 393; *St. Aubyn v. Smart*, L. R. 5 Eq. 183, 3 Chy. App. 646. The payment was not the voluntary act of Mr. Gilmour, but was promoted, so to speak, by the fact of the drawing of the bill of exchange. This transaction was duly entered in the books of the firm of R. L. & M. at the time, and they must be taken to have adopted Mr. Ross's action.

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It cannot be contended for a moment that the firm of R. L. & M. were beneficially entitled to these costs. What inference is to be drawn then from their collecting them? Either that they wrongfully demanded and procured payment of that which they knew belonged to some other person, or that they acted under an implied authority from the person rightfully entitled to receive the money. As against these respondents, I have no doubt as to which inference I should draw; and although it is quite true no express agreement is shewn to have been made by Mr. Bell on the transfer of the suit for the collection and payment of the costs due to him, yet under the circumstances I think these respondents must be taken to have acted in drawing on Mr. Gilmour for, and receiving these costs from him as the agents of the party rightfully entitled to them. And inasmuch as it was by virtue of their character of solicitors that they procured the payment to be made, they are subject to the summary jurisdiction of this Court to enforce the due application of the money at the instance of the party entitled to it: *Re Carroll*, 2 Chy. Ch. 322; *Re Walker*, *Ib.* 324; *Re Toms*, 3 Chy. Ch. 41.

But it was urged that the moneys in question have been paid to Mr. Ross, who as a member of the firm of Ross & Bell was one of the parties entitled to receive them, and that therefore these respondents are discharged from all further liability to Mr. Bell. Now if it were clearly shewn that the money had been paid over to Mr. Ross as a partner of the firm of R. & B., and in settlement of the costs due to them in this suit of *Gilmour v. Meyers*. I think that would have been an answer to this application. The evidence as to the respondents knowing that Mr. Bell was *solely* entitled is unsatisfactory, and not such as I would have acted on. But in considering the question of payment to Mr. Ross, it must be borne in mind that Mr. Ross filled two characters; he was a member both of the firm of R. L. & M., and he had been formerly a member of the firm of Ross & Bell. The payment to him of the moneys in question, in order to discharge R. L. & M. must at all events, be shown to have been made to him as a member of the firm of R. & B.

The evidence of the respondents' books is conclusively against this contention. The effect of the entries is to treat the moneys received by Ross from Gilmour simply as partnership funds, and Mr. Ross is debited therewith as so much

paid to him on the general partnership account between himself and the firm of Ross, Lauder & Mulock. If this debit were intended as a payment of costs due to the firm of Ross & Bell, Mr. Ross was entitled to a credit in his account for the amount of these costs, a credit which he has not received. The firm of R. L. & M. having thus had the benefit of this payment to Ross as a payment on partnership account, cannot now repudiate that position and claim the payment to have been made to Mr. Ross in a different character.

It is objected that the representatives of Mr. Ross should have been brought before the Court, and that they are primarily liable to refund the moneys in question, because Mr. Ross it is said received the money. But that objection fails for the reasons already appearing. Mr. Ross as between himself and these respondents was equally liable to this petitioner, but from the evidence before me I do not see that he could be said to have incurred any liability beyond the common liability which attaches to each member of the firm to account for the moneys in question, to the party entitled to it. The respondents have no equity entitling them to insist that Mr. Ross's estate should be first exhausted before they should be called upon, nor to be indemnified by his estate against the payment of this claim, after adopting his acts as I hold them to have done, and even if they had I do not see on what principle they could insist on it as a reason for escaping from the summary jurisdiction of the Court when invoked in aid of this petitioner.

It is urged, however, that the costs in question were due, not to the petitioner individually, but partly to the firm of Ross & Bell, and partly to the firm of Bell & Crombie, and that on this ground there is a want of proper parties which will prevent the petitioner succeeding on this application. Now, with regard to the firm of Ross & Bell, Mr. Bell as the surviving member of that firm, I take it is entitled to recover the assets due to that firm without joining the representatives of his deceased partner Mr. Ross. He will of course be liable to account to Mr. Ross's representatives for his share (whatever it may be) of the moneys so collected. But as regards the firm of Bell & Crombie the case may possibly be different. It is shown that the suit of *Gilmour v. Meyers* was for a year before it was transferred to R. L. & P. carried on by the firm of Bell & Crombie, and Mr. Crombie may have some interest in the costs

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incurred during that year, though it is not shown as a matter of fact that any costs were incurred during that interval, or that Mr. Crombie has any interest in such costs, if any were so incurred.

Whatever Mr. Crombie's interests may be in the costs, if any incurred whilst the firm of Bell & Crombie had the conduct of the suit, there is nothing to show that he had or can be reasonably supposed to have any interest in the costs incurred by the firm of Ross & Bell. So far as those costs are concerned therefore there can be no ground for making him a party to this application. It is said by the petitioner that he can establish that Mr. Crombie has no interest whatever in any part of the costs in question, and that he alone is solely entitled thereto, and I think it reasonable that he should have an opportunity of doing so.

The petitioner has very reasonably consented to a reference being had to the Master to settle the amount claimed to be due by him to the respondents on the footing of the account "A."

The Master can also ascertain what proportion of the sum of \$1263 is due to the petitioner individually, or as surviving partner of the firm of Ross & Bell, and certify the balance due to and from the petitioner and respondents, respectively. Further directions and costs can be reserved until the Master has reported. The respondents on the reference to be at liberty to furnish items of the amounts mentioned in their account "A."

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The respondents appealed from this decision.

The appeal came on to be heard on 3rd February, 1873, before Strong, V. C., when the same counsel appeared, and their arguments and the authorities referred to by them were substantially the same as before the Referee, and on a subsequent day the learned Vice-Chancellor pronounced the following judgment:—

STRONG, V. C.—I am of opinion that the order appealed against must be discharged.

In the first place I must determine that the Referee had no jurisdiction to entertain this application.

By the Act 34 Vict. cap 10, O., creating the office of Referee, the Court is authorized to make general orders empowering the Referee to trans-

act any business which could at that time have been transacted by a Judge in Chambers. Pursuant to this authority the Court made the general orders of 23rd Feb., 1871. I find nothing either in these orders or in the Consolidated Order 197, prescribing the jurisdiction of a Judge in Chambers, which delegates to the Referee now, or to a Judge in Chambers formerly, the jurisdiction in matters of summary applications against solicitors. And I do not find from any reported case that such a practice has ever received the sanction of the Court.

In England it is clear from several cases collected in Daniell's Practice, (4th ed.) 1693, that similar applications are always made in Court, and I think strong reason exists why the same practice should be followed here.

But assuming that the Referee had jurisdiction I do not think this order could have been sustained.

The application was originally by Mr. Bell in the character of surviving partner of the firm of Ross & Bell, but by affidavits which the Referee permitted to be read in reply, the petitioner sought to shew that he was the only person interested in that firm, Mr. Ross having been a mere nominal partner. I consider these affidavits inadmissible. In them the petitioner manifestly shifted his ground, to borrow a term used in special pleading this case in reply was a "departure."

This, however, makes little difference as the Referee thought that the affidavits referred to were insufficient to fix the respondents with notice of the fact that Mr. Ross was only a nominal partner in the firm of Ross & Bell.

Mr. Lauder had therefore a right to assume that Mr. Ross, on behalf of Ross & Bell, had power to receive from Mr. Gilmour the sum of money in question.

It may be that by reason of the entries in the books of Ross, Lauder & Mulock, which are stated in the judgment of the Referee, and upon the application of ordinary principles of the law of partnership, the respondents are either at law or in equity liable to Mr. Bell, for the sum of money received from Mr. Gilmour. Upon this I express no opinion. But as this money was dealt with in the way it was by the express direction of Mr. Ross, who was at the time a partner of the petitioners having, for anything the respondents knew to the contrary, power to exercise all the rights of a partner in respect of

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it. I think it impossible to say that the respondents can now be ordered to pay it over on a summary application because they happen to be solicitors, and upon the assumption that their withholding it is a breach of duty. Had Mr. Ross been alive and assuming as I must do, on the evidence, that he was not an interested partner in the firm of Ross & Bell how could any summary application for the payment of this money have been sustained? To have said that Mr. Bell alone, and adversely to Mr. Ross, could have obtained an order would have been to have said that a partnership suit could be tried in the form of a summary application against a solicitor. And Mr. Ross surely could not have joined with Mr. Bell in such a petition for how could he have been permitted to make his partners Messrs. Lauder & Mulock liable by alleging their breach of duty in respect of acts in which he was beyond all question the principal?

Then it seems that it can make no difference that Mr. Ross is not still living. Mr. Bell makes this application as surviving partner of the firm of Ross & Bell, but he makes it in the interest of the representatives of the deceased partner, as well as in that of himself, and he is therefore in this particular proceeding representing his deceased partner. The same disqualification which would therefore have prevented Mr. Ross from maintaining the petitions attaches as a ground of disqualification to Mr. Bell.

Then the rights of the defendants as surviving partners in the firm of Ross, Lauder & Mulock might be seriously affected if this order should stand, and complications which would be avoided by a decree might be occasioned in the accounts of that firm.

Further, supposing the respondents to have submitted to this order, and that it should hereafter be made to appear that in fact Mr. Ross, as between himself and Mr. Bell, had a right in the state of the accounts at the time Mr. Gilmour paid this money, to appropriate it to his own use and that his estate still remains a creditor of the firm of Ross & Bell, in what position would the respondents be placed? This objection may probably have been obviated if the representatives of Mr. Ross had been parties to this application, but I do not understand that they appeared on the petition. For the reasons given I have no hesitation in saying that the facts do not shew a proper case for the exercise of the exceptional jurisdiction which has been invoked.

This I should say, even in the absence of authority in favour of the proposition, but the

case of *Re Lawrence*, 2 Sm. & Giff. 367, warrants all I decide. The present case moreover is made much stronger than that just quoted by the important fact of Mr. Ross having been a partner in both firms.

The order must be discharged and the petition dismissed with costs.

Order discharged and petition dismissed.

DAVIDSON v. BOYES.

Married woman—Separate answer—Parties to a foreclosure suit.

A married woman is not in respect of dower a necessary party to a bill for the foreclosure of a mortgage in which she has joined to bar dower.

On an application, however, for a married woman so made a party to answer separately an order will be granted, but the plaintiff will take it at the risk of having the costs of making her a party afterwards disallowed.

[January 13, 1873.—Referee—Strong, V. C.]

Wardrop applied *ex parte* for an order for a married woman to answer the bill apart from her husband.

MR. HOLMESTED.—This is an application for an order for the defendant Janet Boyes to answer separately. The suit is for foreclosure, and it appears from the bill of complaint that the defendant Janet Boyes joined with her husband in the two mortgages in question in the suit, for the purpose of barring her dower, and in the 5th paragraph it is alleged that “the defendant Francis Dixon Boyes, (the husband), is entitled to the equity of redemption in the said lands, and the said defendant Janet Boyes is also entitled to the equity of redemption therein by reason of her claiming dower in such equity of redemption.”

The practice is clear, (*Wright v. Morrow*, 1 Chy. Ch. 286,) that it is only where a married woman is made party to a suit in consequence of her having some separate interest in the subject of the suit independent and apart from her husband, that an order for her to answer separately should be made, at the instance of the plaintiff (See Dan. Pr. Perkins, 1st ed. vol. I. p. 191) and before granting the order the Court must be satisfied that it is a proper case to do so.

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It does not appear to me that this married woman is shown to have any such separate and independent interest. According to the well established practice of the Court, the wife of a mortgagor, who has barred her dower in the mortgaged property is an unnecessary party to a suit for foreclosure of the mortgage : *Moffatt v. Thompson*, 3 Gr. 111.

The reason of that rule I think is obvious. By barring her dower in the mortgage deed, she bars her legal claim to dower, and all that remains to her is the right of dower in the equity of redemption, and that is all the interest this married woman is alleged to have here. But the right of the married woman to dower in such an interest is contingent on her husband *dying beneficially entitled*, (Con. Stat. U. C. cap. 84, sec. 1,) to the equity of redemption. Now, if in the husband's lifetime his equity of redemption is divested either by sale or by foreclosure, or other means, then the wife's right to dower is also gone : Leith's Real Property Stats. p. 224.

But the solicitor for the plaintiff contends that the case of *Forrest v. Laycock*, 18 Gr. 611, has established a different rule. But the Vice-Chancellor in giving judgment in that case said, (p. 521) that "it was not necessary for the wife's defence that the Court should decide this point in her favor, i.e., after she had once barred her dower she was still a necessary party to a subsequent deed, by her husband conveying the equity of redemption in order effectually to bar her dower therein," and he goes on to say "a *bona fide* compromise is sustainable as against creditors as well as others. A reasonable settlement of a claim made and acceded to in good faith may be valid though it should be decided afterwards that the law was different from what the parties had assumed it to be," and that I think must be taken to be the real ground of his decision. In that case the Vice-Chancellor held that the wife had made a *bona fide* claim which had been *bona fide* acquiesced in, and that it constituted a good consideration for a compromise as against creditors. There is no case that I know of which establishes the proposition that a wife entitled to an inchoate right to dower of this kind is entitled to a present right of redemption.

I do not think that the Vice-Chancellor intended to work any revolution in the practice of the Court neither do I think that I should lend any countenance to the idea that in suits of this kind the wife of the mortgagee is a necessary party as I think I might thereby needlessly

be casting doubt on multitudes of titles. I therefore refuse the order.

This decision being appealed from was overruled by Strong, V. C., who, although he thought that the married woman was not properly joined, considered that the Referee could not, on a motion of this kind enter into the question whether a married woman was a necessary party to a suit, but should have granted the order, leaving the plaintiff to incur the risk of having the costs of making of her a party disallowed at the hearing.

The plaintiff subsequently, without taking out the order for the married woman to answer separately, dismissed his bill against her.

CATTANACH v. URQUHART.

Disputing note, effect of.—Statute of Limitations, how set up as a defence to a foreclosure suit.—Mistake of solicitor.—Chambers.

An application was made to vacate a praecipe decree taken into the Master's office, and to allow instead of a disputing note, an answer to be filed setting up the Statute of Limitations. The application was *held* to be properly made in Chambers, and was granted, it being shewn that the note was filed through the mistake of a solicitor in supposing that the defence of the Statute was available under it.

Under a note disputing the amount of the plaintiff's claim, filed in a mortgage suit, questions as to the correctness of the account alone can be entered into.

The Statute of Limitations cannot be set up as a defence in this way, but must be pleaded.

[January 22, 1873.—Referee—Blake, V. C.]

The circumstances under which this application was made were as follows :—

The bill was filed and served in June, 1872.

A note disputing plaintiff's claim was filed 20th September, 1872, and on 21st September 1872, the usual praecipe decree for foreclosure issued, which was carried into the Master's office on 14th October, 1872, and parties were added in the Master's office.

The notice of motion on this application was returnable originally on the 25th November, 1872, but the motion stood over from time to time until 9th January, 1873.

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The ground on which the defendant claimed relief, was the mistake of the solicitor originally employed by him, who being under the impression that the defence of the Statute of Limitations could be relied on under the note disputing the plaintiff's claim, neglected to file an answer.

The plaintiffs took several objections to the motion : they contended this was in the nature of an application to file a supplemental answer, and should therefore have been made to the Court: *Attorney General v. Casey*, 2 Chy. Ch. 279.

Arnoldi for the defendant (the applicant.)

Foster, contra.

Merrill v. Ellis, 1 Chy. Ch. 268, 303 ; *Irwin v. Lancashire*, 2 Chy. Ch. 293 ; *Cherry v. Morton*, 1 Chy. Ch. 25 ; and *Ritchie v. Gilbert*, 3 Chy. Ch. 377, were referred to by counsel.

MR. HOLMESTED.—The defendant applies to set aside the decree and all subsequent proceedings, and for leave to come in and answer, setting up a defence of the Statute of Limitations.

The precise effect of a disputing note is nowhere stated in the Orders. I think the filing of such a note simply entitles the defendant to notice of taking the account, as stated in the endorsement on the office copy of the bill : (Ord. 436, Sched. S.) ; and on taking such account it is not open to a defendant to raise any question which by the ordinary practice of the Court should be specially pleaded by him. It has been held that such a note is not an *answer* under Order 134 so as to entitle a defendant to an order to produce : 2 Chy. Ch. 54 ; and I therefore think it cannot consistently be said to be an answer on the present application. Unless it be an answer the motion is regular, and defendant should not have applied for leave, as the plaintiff contends, to file a supplemental answer, which proceeding necessarily supposes a previous answer to have been filed. The plaintiffs also contend that the present application is in the nature of an appeal from the decree, but that objection, I think, is untenable. The decree was not made on the merits, but was in effect *pro confesso*, the plaintiff admits the regularity of it, and of all subsequent proceedings, and he comes now to be let in to answer as an indulgence. I think the case is within the rule laid down in *Kline v. Kline*, 3 Chy. Ch. 79. The delay has not been very great, and has, in my opinion, been sufficiently ex-

plained. The defence which the defendant proposes to raise is the Statute of Limitations, a defence not open to him, I think, under his note disputing the plaintiff's claim. In *Percival v. Caney*, 14 Jur. 473, the Court refused to grant leave to parties added by revivor who were also defendants to the original bill to set up a defence of that kind, but I think the peculiar circumstances of that case do not exist here ; and that that case is therefore no authority against granting the defendant the indulgence he asks. But I can only do so on the terms of the defendant paying to the plaintiff and the parties added in the Master's office, all costs incurred by them from and including the decree to the present time, including the costs of this application, such costs to be paid and an answer filed within fourteen days from this date, and as the plaintiffs may possibly find it necessary to amend their bill, the defendant in the event of such amendment being made must accept seven days notice of hearing for the next sittings.

From this judgment the plaintiff appealed.

The appeal was heard in January, 1873, and judgment delivered by :—

BLAKE, V. C.—I am of opinion that it is necessary to plead the Statute of Limitations in order that the defendant may obtain the benefit of it. The 546th General Order of the Court says, "all defences are to be presented to the Court by demurrer or answer, or both, according to circumstances." Here the defendant proposes to raise that which is a complete defence to the whole of the plaintiff's claim, and which if allowed as a defence would shew them not entitled to any decree. I do not think it was intended under the disputing note which says merely, "I dispute the amount claimed by the plaintiff in this cause" to allow such defences as that of usury, of the Statute of Limitations, or the like to be raised. This notice points merely to some error in the account of the plaintiff, and to an intention at the proper time of disputing and resisting the claim as made. The authorities seem to shew clearly that such a defence as the present must be raised by answer, and that when this has not been done and the plaintiff obtains a decree for account, the defendant cannot thereafter raise any questions save those of account ; at least that he cannot raise after decree a defence which could be raised properly by answer, and which when established defeats *in toto* the plaintiff's right to a decree.

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Questions of account are properly postponed to the Master's office, but I take it that where a bill is allowed to go *pro confesso*, and the defendant simply files a disputing note, he must be deemed to have admitted sufficient to entitle the plaintiff to a decree, and reserved to himself merely the right to reduce the amount of the plaintiff's claim: see *Penn v. Lockwood*, 1 Gr. 547; *Proudfoot v. Bush*, 7 Gr. 518; *Darby* on Statutes of Limitations 439: 2 Dan. Pr. 1099. I think the Referee was correct in his finding that as this was not an application, such as *Miller v. Vandyke*, but a motion to answer, where in error the defendants had omitted to do so, the practice warranted the motion being made before him. The motion having been considered and decided in such a manner that it cannot possibly injure certain creditors not notified of the application, the want of notice to them cannot form a sufficient reason for refusing the order their co-defendant asks for. I am also of opinion that under the circumstances the Referee should have made the order he did. The delay has been satisfactorily explained. No fault can be imputed to the defendant personally. His solicitor seems to have acted under a misapprehension as to the effect of Order 436, upon which there had not been any adjudication by the Court, and I do not think there has been any such carelessness or negligence as disentitles the defendant to the raising of this defence now. There would have been more difficulty in arriving at this conclusion some years ago when it was doubtful how far the Court could go in allowing a defendant as an indulgence to raise such a defence. But as it has been recently decided that this is what is called a *meritorious* defence, I think the Court is bound to allow the defendant to raise it. The order of the Referee will therefore be affirmed with costs. The defendant must enable the plaintiff to go down at the next Cornwall term, or if desired by the plaintiff the decree at present in force will stand, with liberty to the defendants to raise the defence of the Statute of Limitations in the Master's office. If this suggestion be adopted, the delay consequent upon an examination and hearing will be avoided.

Order affirmed.

ELLIOTT v. QUEEN CITY ASSURANCE CO.

Attendance of witnesses before arbitrators—Subpoena to another Province—Con. Stat. Can. cap. 79 sec. 4—“Suit pending.”

Upon a submission to arbitration being made a rule or order of Court, a suit is pending within the meaning of Con. Stat. Can. cap. 79, sec. 4, so as to enable the Superior Courts of Law and Equity to issue process to compel the attendance, before arbitrators, of witnesses resident out of the jurisdiction of the Courts.

[January 27, 1873.—*Chancellor.*]

This was an application under Con. Stat. Can. cap. 79, sec. 4, to compel a witness residing in the Province of Quebec to attend before an arbitrator.

Bethune, for the applicant, cited *O'Flannagan v. Geoghegan*, 16 C. B. 636; *McKerchie v. Montgomery*, 1 Chy. Ch. 225; *Marsden v. Overbury*, 18 C. B. 34; 25 L. J. (C. P.) 200, and *Graham v. Glover*, 5 E. & B. 591.

SPRAGGE, C.—In this matter there has been a reference to arbitration by the parties to the submission, without any action at law or suit in this Court pending. The submission has been made an order of this Court; and the plaintiff now applies for an order commanding the attendance and examination of certain witnesses in Cornwall, in this Province. The case would be clear under sec. 180 of the Common Law Procedure Act, if the witnesses were resident in this Province. They reside in Montreal.

The Act of 1854 (Con. Stat. Can. cap. 79,) authorises a Court or a Judge in which any action or suit is pending to make an order for the issue of a writ to compel the attendance in Upper Canada of witnesses residing in Canada, but without the limits of this Province, and the question is whether in the case of a submission, without suit pending, made an order of this Court, there is then a suit pending within the meaning of the Act of 1854. After some hesitation I have come to the conclusion that there is. A suit may be instituted in this Court in various ways, not only by the filing of a bill but in other modes: of these the most common is by petition. The appointment of guardians to infants, cases of charities under Sir Samuel Romilly's Act, petitions for partition, to which may be added summary applications for administration orders, petitions under 12 Vic. cap. 72, are instances of this. In all these cases the term “suaror” is not as I think inappropriate to those by whom or in whose behalf proceedings are taken in this mode.

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In Wharton's Law Lexicon the first definition of the word "suit" is "an action at law, or proceeding by bill in Chancery; a prosecution, a petition to a Court, &c." In the Imperial Dictionary it is this: "In law an action or process for the recovery of a right or claim, legal application to a Court for justice, prosecution of right before any tribunal."

The proceedings by which a submission to arbitration is made a rule of Court come within the definitions that I have quoted, and if so, then upon an order of Court being made, a suit is pending. It appears to me that it is not the mode in which parties come, or are brought before a Court, that constitutes them suitors; but the fact of their being before a Court, in which their rights or interests are within the jurisdiction of the Court, however brought there, whether by bill, by petition or in any other mode prescribed by lawful authority. Persons so in Court are not strangers certainly. I think they are in proper legal language "suitors." There are proceedings in the Court, intituled in the Court; the files of the Court, the names of its officers, its process, are all used: it would be an anomaly if this could be, without there being a "suit" in the Court, and I may add that the official use of the term "suitor's fee fund" would be inaccurate unless the terms suit and suitor are as comprehensive as I take them to be.

In the course of looking into and considering this question I met with a case of *Webster v. Bishop*, which led me to doubt whether in such a case a suit could be said to be pending. It is reported in Finch's Eq. Precedents (p. 223), and also in Vernon, (vol. 2, p. 444,) more fully in the former. There had been a submission to arbitration which had been made an order of the Court of Chancery, and an attachment issued for non-performance of the award. The party against whom the attachment issued had died, and a *sci. fa.* against the heir and executor was prayed. It was urged against this that it would not lie "because there is no cause in Court and the Statute says only, it shall be prosecuted as in case of a contempt in other cases and a contempt dies with the person." To this it was answered that "this was in nature of a decree, and the executors might be brought in to pay it if they had assets." The report says "because this concerned all Courts as well as this, the Judges were consulted in it, who all were of opinion that the prosecution determined by the death of the party, and could not be revived or carried on further." I confess I do not understand the argument as stated in the

report of the case that "there was no cause in Court" for there was a suit, and it was referred by order of Court. If the Court had adopted this argument, it would have been some authority against the position that a suit was pending, but the *ratio decidendi* was that process of contempt dies with the person.

My conclusion upon the whole is that upon a submission to arbitration being made an order of Court under the Statute a suit is pending within the meaning of the Statute of 1854.

The application is to the discretion of the Court under the Common Law Procedure Act and also under the Act of 1854. A proper case must be shewn upon affidavit.

*Order granted.**

WATEROUS v. FARRAN.

Jurisdiction of the Referee—Application in the nature of appeal—Irregular filing—34 Vict. cap. 10 sec. 2, O.—Amending bill.

When a deputy registrar or other officer, whose duty it is to file papers, receives and files a paper duly presented to him for that purpose, he does a ministerial act, and leaves the regularity of the proceeding on the part of the person presenting the paper to be objected to by any who may have an interest in objecting.

An application to the Referee impeaching the propriety of the filing is not an appeal or in the nature of an appeal from the deputy registrar, or other officer, so as to deprive the Referee of jurisdiction under 34 Vict. cap. 10, sec. 2.

After the expiry of the term limited by an order to amend, the right of the plaintiff to amend under such order is strictly gone, but the defendants right to object to amendments made after the period limited may be waived

[January 27, 1873.—Referee—Chancellor.]

This application came originally before the Referee by way of motion to dismiss the bill for want of prosecution.

MR. HOLMESTED.—In this case an order was made at the hearing of the cause allowing the petitioner to amend his bill as he might be advised on payment of costs of the day. This

* Soon after this case was decided the Act 36 Vict. cap. 12, (O.) was passed, which enables any party to a reference to Arbitrators by rule, order, or submission, to procure the issue of a subpoena commanding the attendance of witnesses before the Arbitrators.—REP.

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order is dated the 5th November, 1872, and appears to have been entered on the 8th November last.

On the 20th November the costs of the day it appears were paid to the agents of the defendant's solicitor.

On the 27th or 28th of November the amendments to the bill were received by the plaintiff's solicitor from his counsel, and on the 28th he wrote requesting the defendant's solicitor to forward the order allowing the amendments and a receipt for the costs in order to produce the same to the deputy registrar on making the proposed amendments; he also at the same time requested the defendant's solicitor to forward the defendant's office copy of the bill for amendment.

The order and proceedings were accordingly forwarded and were received by the plaintiff's solicitor on the evening of the 30th November, or on the following Monday morning the 2nd of December. The office copy was withheld as the defendant's solicitor states by an oversight on his part. From the 2nd to the 11th December nothing appears to have been done on the part of the plaintiff's solicitor, but on the latter day he forwarded a demand of the office copy for service, and on the 12th of December it was served on defendant's solicitor and on the same day the bill was amended.

On the 15th of December notice of motion was served to dismiss for want of prosecution. Under Con. Ord. 83, the plaintiff was bound to amend within fourteen days from the date of the order to amend, otherwise the order to amend becomes void and the case as to dismissal stands in the same situation as if the order had not been made: *McMurray v. G. T. R.*, 3 Chy. Ch. 306.

Con. Ord. 196, moreover provides that "a party neglecting to comply with the condition of an order obtained by him, is to be considered to have waived or abandoned the order so far as the same is beneficial to himself and any other party interested in the matter may take such proceedings as might have taken had the order not been made." But notwithstanding the provisions of these orders it is clear that although the plaintiff neglected to make the amendments within the time limited the cause was not out of Court some further order was still necessary to be obtained by the defendant in order to dismiss the plaintiff's bill: *Carr v. Moffatt*. 9 C. L. J. 52.

Before any such order was obtained or any notice of motion therefor was served, the plaintiff amended the record.

On the part of the defendant it is contended that the amendments made on the 12th of December were made too late, and that they are in consequence null and void. Were I compelled to determine the question on the facts now before me I should say that the amendments were made too late. But I do not think that this question is properly raised before me on this motion, and even if it were, it being in the nature of an appeal from the act of the deputy registrar in allowing the amendments to be made after the time had expired, I do not think I should have jurisdiction to determine it: *Carr v. Moffatt*, *supra*; 34 Vict. cap. 10, sec. 2.

On the present motion I think I must assume that the deputy registrar properly allowed the amendments to be made on the 12th of December, and that being so the motion to dismiss for want of prosecution must consequently fail. The amendments had in fact been made in the record before the notice of this motion was served, and but for the admitted oversight on the part of the defendant's solicitor the defendant's office copy would also have been amended.

If the amendments were irregularly made as contended the proper course seems to me to have been to move against the irregularity. Here the defendant is in effect seeking to set aside proceedings for irregularity without himself complying with Con. Order 277, which provides that in all such motions the notice of motion must specify the irregularity complained of.

The defendants appear to me to have waived all objection to the delay from the 19th of November until at all events the 2nd of December, and the delay of ten days from the 2nd to the 12th is not shown to have caused any serious prejudice to the defendant.

The motion is one of strict right, and as the defendants have failed they must pay costs.

This decision was appealed from.

Cassels for appellant. The Reforce might have entertained the motion as it did not amount to an appeal from the deputy registrar, whose duty it was to file without question all documents presented to him for that purpose, properly stamped. The order to amend became void when fourteen days had elapsed, and amendments made after this period were futile.

He cited: *Hoflick v. Reynolds*, 9 W. R. 431; *Vernon v. Vernon*, L. R. 6 Chy. App. 833; *Carr v. Moffatt*, 9 C. L. J. 52.

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C. Moss, contra. By failure to amend the bill was not out of Court; an application could be made to extend the time for amendment: *Carr v. Moffatt, supra*; *Tampier v. Ingle*, 1 N. R. 159; a consent was equally binding and this appeared, from the correspondence between the solicitors, to have been given. The motion to dismiss was wrong; it should have been one to set aside the amendments: *Tarleton v. Dyer*, 1 R. & M. 1; *Armitstead v. Durham*, 11 Beav. 428; *Cridland v. De Mauley*, 2 DeG. & S. 560.

SPRAGGE, C.—This is an appeal from the Referee in Chambers. The defendant's solicitor gave notice of motion to dismiss for want of prosecution. The application was refused, and this is an appeal from that decision. The judgment of the Referee states accurately, as it is agreed, the circumstances of the case in relation to the application before him, and from what therein appears and the affidavits and other papers which were before him, and which I have also read, I should have had no hesitation in refusing the application if it had been before me.

My own individual opinion is, that the learned Referee had jurisdiction to grant or refuse the application. I gather from his judgment that he refused it, not only because he conceived that it would be reviewing the act of the local Master and Registrar at Brantford, which under the judgment of my brother Blake, in *Carr v. Moffatt*, he conceived he had no authority to do, but also because in his judgment it ought not to have been granted. I agree with him upon the second point.

Upon the question of jurisdiction I think the application was not an appeal, nor in the nature of an appeal, from the local officer at Brantford, inasmuch as it appears by his certificate, the only paper that is put in from his office, and which is signed by him as Deputy Registrar only, that he put the amended bill on his files simply as Deputy Registrar, and therefore solely as a ministerial act, and therein acted as I believe many others whose duty it is to file papers do act, receiving and filing the paper, but leaving the regularity of the proceeding to be objected to by anyone who may have an interest in objecting to it. It appears indeed by Con. Ord. 36, that granting further time to amend is not within the powers granted to the local Master, and therefore the Master at Brantford must have acted in a ministerial capacity as Deputy Registrar only, and the application before the Referee could not have been by way of appeal or in the nature of an appeal.

I have already said that I think the Referee was right in refusing upon the merits of the case before him to dismiss the plaintiff's bill; but I think this should have been in the exercise of his discretion, in order that under the circumstances application might be made for further time to amend, and that the amended bill filed might be allowed to remain on the files or to be filed now, and such an application should I think be granted. To dismiss the bill, under the circumstances appearing upon the affidavits and other papers, would be out of the question. I think the Referee's order was right and that the appeal should be dismissed with costs.

Appeal dismissed.

MOFFATT V. PRENTICE.

Examination of parties—Order 138—Con. Stat. Can. cap. 79, sec. 4—Subpoena to another Province—“Witnesses.”

The term “witness,” in Con. Stat. Can. cap. 79, sec. 4, includes parties to the cause, as well as witnesses in the ordinary sense of the word.

Examination of a defendant after answer under Order 138 is an examination of witnesses within this Act.

Application for an order under sec. 4 of the Act is properly made to the Referee in Chambers.

[January 27, 1873.—Referee—Chancellor.]

This was an appeal from two decisions of the Referee, one refusing to discharge an order granted *ex parte* for the issue of a subpoena under Con. Stat. Can. cap. 79, sec. 4, to the Province of Quebec to compel the attendance of two defendants before the Master at Cornwall, for examination after answer; and the other granting an order requiring them to attend for examination, at their own expense, in consequence of their having disobeyed the subpoena.

The following was the judgment of :—

MR. HOLMESTED.—In this case an order was made by me *ex parte* on the 8th of January inst., directing a writ of subpoena to issue to compel the attendance of the defendants R. A. and N. J. H., the Secretary of the Montreal Mining Co., to be examined after answer under Con. Stat. Can. cap. 79, sec. 4, and Orders 138–140.

The parties it is admitted have been duly subpoenaed, but have failed to attend in obedience

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to the subpoena, and two motions have been made before me, one on the part of the defendants to rescind my order of the 8th inst., and the other on the part of the plaintiff that the defendants do attend at their own expense and submit to examination. Both motions were argued at the same time. The defendants objected that the Referee in Chambers had no jurisdiction to make an order for a subpoena to issue under this Statute. I think the Referee has jurisdiction.

The words of the Act are I think sufficient to authorize a Judge in Chambers making an order for a subpoena to issue, at all events it has always been the practice both at law and in this Court to entertain applications of this kind in Chambers, and I am unable to discover anything in 34 Vict. (Ont.) cap. 10, or in the Orders of the Court, which excludes this authority of a Judge in Chambers from the jurisdiction of the Referee. So far as that objection is concerned I think the order was properly made.

It is contended, however, that the Act does not apply to a proceeding of this kind, that it is confined in its operation to cases where the attendance of the witness is required *upon any trial, enquête, or examination of witnesses*, and it is said that the examination of a defendant after answer does not come under any of these terms. The question seems to depend upon what is the proper signification of the term witness. In Wharton's Law Lexicon a witness is defined to be "one who gives evidence in a cause." In Tomlinson's Law Dictionary the definition is "one who gives evidence in a cause; an indifferent person to each party, who is sworn to speak the truth, the whole truth, and nothing but the truth." This definition it is to be observed since the acts enabling parties to give evidence is no longer strictly accurate. In the Imperial Dictionary a witness in law is said to be "a person who gives testimony or evidence in a judicial proceeding, and is sworn to speak the truth, the whole truth, and nothing but the truth." I think the last definition correctly defines the meaning of the word witness, and applying that definition to the case before me I think a defendant called for examination after answer is a witness within the meaning of the Statute.

In *McKerchie v. Montgomery*, 1 Chy. Ch. 225, an order was made for a subpoena to compel the attendance of a witness on an interlocutory proceeding in a cause upon which evidence of a witness was required. In *Harris v. Barber*, 25 L. J. (Q. B.) 98, an order was made under the Imp. Act, 17 & 18 Vict. cap. 34, to compel the

attendance of the plaintiff at the trial, and the Court, when granting the order, said it was not necessary that the defendant should oblige himself to call the plaintiff as a witness, as a condition of his getting the order.

Here the examination of these defendants may be used by the plaintiff at the hearing as evidence in the cause, without calling the defendants: *Proctor v. Grant*, 9 Gr. 31; Orders 166 and 168.

Now as in *Harris v. Barber* the Court held that the defendant was entitled to compel the personal attendance of the plaintiff at the trial, and was not obliged to undertake to call him as a witness, so in this case I think the plaintiff is entitled to compel the attendance of the parties for examination, without binding himself to use their examination at the hearing. The fact that the evidence to be taken on such examination may be used as evidence at the hearing, is sufficient to entitle him to this order, and entitles him to say that the examination of a defendant under Order 133 is an examination of witnesses within the meaning of the Act.

In *O'Flanagan v. Geoghegan*, 16 C. B. N. S. 636, it was held that the English Act did not warrant the issue of a subpoena to compel the attendance of witnesses before an arbitrator; but I do not think that decision affects the present case. From the observations of Willes, J., it would seem that that decision turned altogether on the fact that the mode of compelling the attendance of witnesses before arbitrators, as provided by Statute, is by Judge's order and not by subpoena, and as the Imp. Act 17 & 18 Vict. cap. 34, provides, as does ours, only for the issue of a subpoena, the service of which in the United Kingdom was to be as valid as if the same had been served within the jurisdiction of the Court issuing the same, it seems necessarily to follow that as the service of a subpoena within the jurisdiction, on a witness, to compel his attendance before an arbitrator would have been of no avail, so the service of such a subpoena, beyond the jurisdiction, could be of no avail either. That case, therefore, is not an authority against the order now moved against, the mode of compelling the attendance of a party for examination being by subpoena. (Order 133.) I am of opinion that I had power to make the order and that it was regular, I therefore dismiss the defendants' motion with costs.

The defendants appealed from this judgment.

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Cassels, for defendants, on the appeal, cited : *Proctor v. Grant*, 9 Gr. 26; *Fowler v. Boulton*, 12 Gr. 437; *Douglas v. Ward*, 11 Gr. 39; *Harris v. Barber*, 25 L. J. (Q. B.) 98; *McKerchie v. Montgomery*, 1 Chy. Ch. 225; *Young v. O'Reilly*, 24 U. C. Q. B. 172, and *Daly v. Robinson*, 1 Chy. Ch. 271.

Hoyles for the plaintiff.

SPRAGGE, C.—The defendants concede that the Referee was right upon the question of jurisdiction. The other question raised upon this appeal is, whether parties can be compelled to attend personally for examination under the Statute of 1854, (Con. Stat. Can. cap. 79, sec. 4.)

The Act 18 Vict. cap. 9, recites that great inconvenience arises in the administration of justice from the want of a power in the Superior Courts of Law and Equity to compel the attendance of witnesses in one jurisdiction from another jurisdiction, and that the examination of such witnesses by commission is not in all cases a sufficient remedy for such inconvenience, and it enables a Court or Judge in the mode pointed out by the Statute to compel the personal attendance at any trial, or *enquête*, or examination of witnesses, of any witness who may not be within the jurisdiction of the Court, but within the Province of Canada. The question is, whether a party examined under Con. Order 138 of this Court is a witness within the meaning of the Act.

If resident within the jurisdiction of this Court, the Con. Order 138 is that he may be compelled to attend and testify, in the same manner, upon the same terms, and subject to the same rules of examination "as any witness" with an exception thereafter provided, and which does not touch this question. I do not know that the words "as any witness" throw any light upon the question.

The reasons given in the preamble for passing the Act, certainly apply *a fortiori* to the examination of parties. If their examination is not within the Act it must be because the term "witnesses" does not apply to them. I think looking at the object to be remedied and the entire propriety of its application to the examination of parties we should use the word "witness" in its widest sense.

Before the passing of the Act the term witness was applied to parties by 16 Vict. cap. 19. Sec. 2, enabled parties to call opposite parties as witnesses ; and the general order in question bears date after that statute. It is not an essential to a person being a witness that his evidence should

be receivable in any event. Examinations *de bene esse* are examples to the contrary. Nor do I see that the circumstance of the examining party having the option to use or not to use the evidence of the examinant takes from the latter the character of "witness." It is true that *his* evidence has not all the incidents that ordinarily attach to evidence, and in common parlance the word witness is used to denote one, not a party, who gives evidence in some legal proceeding, but the changes in the law of evidence, that effected by 16 Vict. to which I have adverted, and our more recent Evidence Act have made parties witnesses. If the Act 16 Vict., using the same phraseology as is used, had enabled a party to examine his opponent before as well as at the trial, and with the option of using or not using his evidence at the trial, the party examined could be a witness at a previous examination as well as at the trial ; and this as I think, not only by reason of the use of the term witness, but because he would be a witness, though under somewhat different conditions from those incident to his giving evidence at a trial.

The strongest argument against a party so examined being properly designated a witness is probably that his examination is for the purposes of discovery, and in lieu of discovery by way of answer to interrogatories contained in a bill. It must be conceded, I think, that in answering such interrogatories his position was not that of a witness. The answer was two-fold it was a defence and also a discovery ; but still it was a pleading. When its office became that of a defence only, the examination ceased to be a pleading. Did it not then really become this, an examination in which the defendant was compelled, at the instance of the plaintiff, to testify as to all such matters in issue as the plaintiff chose to question him about ? An examination in lieu of a discovery by cross bill stands upon the same footing.

The term witness in its legal sense, means as I understand it, one who testifies in some legal proceeding. The definitions quoted by the learned Referee are all more or less restrictive ; that from Wharton's Law Lexicon "one who gives evidence in a cause" is the least so. Mr. Daniel in his book of practice (I quote from the American ed. p. 1030) says "oral or unwritten testimony is that which is given by, or taken down from the mouth of, living witnesses." This would in terms apply to our mode of the examination of a party by his opponent.

I am referred to a case in the Court of Queen's Bench, *Young v. O'Reilly*, 24 U. C. Q. B. 172,

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in which the then Chief Justice of the Court intimated a doubt whether sec. 4, of cap. 79, applied to the case of parties, his reason being that the 16th sec. of cap. 32 Con. Stat. U. C., apparently contemplates the issue of a commission in such a case, in lieu of the notice or subpoena provided for in the 15th sec. The case went off upon another point. With great deference to the learned Chief Justice I think he must have overlooked the circumstance that the provisions embodied in secs. 15 and 16 to which he refers were passed two years before the Act which authorized the issue of subpoenas to any part of Canada, out of the limits of this Province, and could not therefore be any indication of the intention of the Legislature that the course of proceeding should be different in the case of parties from that in the case of ordinary witnesses. The two sections in the original Act place parties, so far as procuring their evidence goes, upon the same footing as witnesses.

In *Young v. O'Reilly*, a previous case of *Tyre v. Wilkes*, 18 U. C. Q. B. 46, is referred to, in which it was held that "a party to a suit cannot be compelled to attend from a country beyond the jurisdiction of the Court," and the different provisions in the two sections of the Act 16 Vict. and a decision of the Court in a previous case of *Patchin v. Davis*, 10 U. C. Q. B. 639, are referred to. *Patchin v. Davis*, was decided before the passing of the Act 18 Vict. and could not have been decided otherwise. In *Tyre v. Wilkes*, the Act 18 Vict. was not referred to, but the law was, so far as appears from the judgment, assumed to rest upon the Act 16 Vict., and in fact the law did rest upon that Act, so far as the consequence of the non-attendance of a party was concerned.

The defendant claimed to have the plaintiff non-suited. This may be done under the Act 16 Vict. The Act 18 Vict. contains no such provision. It provides only for compelling the attendance of witnesses.

It may be urged that if the Act 18 Vict. were intended to apply to parties, as well as witnesses in the ordinary sense, it would have made the like provision as is made by 16 Vict. as to the consequence of a failure to attend. To this it may be answered that 16 Vict. is essentially an evidence Act; and does not deal with the mode of procuring the attendance of witnesses either within or without the Province, while the Act 18 Vict. deals with the case of witnesses out of the jurisdiction, and of compelling their attendance within the Province, and besides, a re-enactment of these provisions was unnecessary.

I think that the order appealed from was right, and that the appeal should be dismissed, with costs.*

Appeal dismissed.

BULL V. HARPER.

Compensation—Effect of conveyance or vesting order—Misdescription in advertisement.

A purchaser by taking a conveyance or vesting order waives all objections to the title. He also takes upon himself the responsibility of obtaining possession, and if evicted by a title to which his covenants do not extend, he has no right to compensation on that account.

Misdescription in the advertisement is a ground for compensation even after conveyance.

[January 28, 1873.—*Referee.*]

Motion by a purchaser for compensation. (1) His right to possession of the lands purchased being resisted by the person in possession; (2) for the costs of defence in *McKay v. Harper*, a suit in which an equitable claim was set up adverse to the purchaser and his vendor; (3) for loss of an opportunity for the sale of the lands; (4) for the deterioration in value of the land by unhusband-like uses by McKay, the occupant; (5) for costs paid to the Trust and Loan Company; (6) for \$50, estimated costs of an action of ejectment against the occupant, or being the sum which he was willing to take to give up possession.

W. G. P. Cassels, for the applicant; compensation will be given even after vesting order: *Thomas v. Buxton*, L. R. 8 Eq. 120; *Stewart v. Hunter*, 2 Chy. Ch. 335; *Horner v. Williams*, Jon. & Ca. 274; *Dart Vendors and Purchasers*, 1110 (4th ed.); *Sugden*, 551 (14th ed.) The estate is liable according to offers of indemnity made by the defendant's solicitor, as he is the proper person to put the purchaser in possession: *Con. Order*, 389; and *Dalby v. Pullen*, 1 R. & M. 296.

Bain, for creditors. The purchasers only remedy after the contract is completed by conveyance, is upon his covenants; and having preferred a vesting order containing none, he has no claim to relief: *Sugden Vend. & Purch.* 197 (13th ed.); *McCall v. Faithorne*, 10 Gr.

* See *McIntyre v. Fair and Stratford v. G.W.R.*, post infra and in 9 C. L. J. 312.

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324; *Newham v. May*, 13 Price, 749; *Thomas v. Powell*, 2 Cox, 394. The fact of the purchaser having dealt with the property by making a contract for sale, would deprive him of a right to compensation. No compensation could be given for speculative costs, but only for those actually incurred.

MR. HOLMESTED.—In this case a sale took place under the Decree on 28th November, 1871. Part of the lands sold were bought by Mr. Schofield, for the sum of \$330. The advertisement stated that the lot in question would be sold “*subject to a mortgage thereon, in favour of and held by the T. & L. Co., on which there is due for principal money \$800, and interest at eight per cent. from 1st October, 1870.*” The advertisement also stated that the purchaser would be let into possession *within six months after the sale.*” The purchase money was payable as follows: one-tenth at the sale, and the balance “*to be payable on purchaser getting possession without interest.”*

Under these conditions the purchaser was entitled to get possession on or before the 28th May, 1872. It appears he has not yet obtained possession.

Mr. Schofield paid the deposit at the sale in March, 1872. Without waiting for the delivery of possession, he paid the balance of his purchase money to the vendor’s solicitor; and on 29th April, 1872, he obtained a vesting order, vesting the lot in question in him.

On the 11th March, 1872, one John McKay, who was in adverse possession of the lot, filed a Bill in Chancery, in which Mr. Schofield was made a defendant, McKay claiming that he had an equitable claim or title to the land in question, and that Schofield had purchased with notice of his rights. This bill appears, from the pencil memorandum endorsed on the office copy produced, to have been served on Mr. S. on the 26th March; but whether before or after he paid the balance of his purchase money does not appear. It is quite clear, however, from the copy of Mr. Schofield’s answer in that suit, which is produced, and which answer appears to have been sworn on the 17th April, 1872, that Mr. Schofield had full notice of the suit, and of McKay’s claim, *before* he obtained the vesting order. The suit proceeded to a hearing, and on the 29th November, 1872, a decree was made dismissing the bill with costs. The plaintiff (McKay) being insolvent, however, Mr. Schofield is unable to recover his costs.

On the 26th March, 1872, Mr. Schofield entered into an agreement to sell the land in question to one George K. Huehn, for \$2,500, payable as follows: \$500 on 1st March, 1873, and balance in eight equal annual instalments of \$250 each, without interest, and bound himself to give possession of the lot to his vendee, “so soon as he (the vendor) shall have obtained possession thereof under and by virtue of his purchase of the same, at the Chancery sale thereof on the 28th November last, at Durham.” In consequence of the delay in obtaining possession in this suit, Huehn and Schofield, on the 14th December last, agreed to cancel the agreement.

It also appears that in addition to the amount stated in the advertisement to be due on the T. & L. Company’s mortgage, there was a further sum of \$31.70 due to the T. & L. Co. in respect of costs, and which Schofield has paid to the company.

Mr. Schofield now applies to be allowed compensation out of his purchase money:—

1st. For the loss he has sustained by not being let into possession on the 28th May last.

2nd. For costs he has incurred in defending the suit brought by McKay, which have been taxed at \$219.26.

3rd. For loss of sale to Huehn.

4th. For deterioration in value of land since the 28th May last.

5th. For costs paid to the T. & L. Co.

6th. For expenses necessary to be incurred in ejecting McKay, who, it appears, is still in possession, but offers to leave on being paid \$50.

The ground on which the purchaser chiefly rests his claim to compensation, under the 1st, 2nd, and 6th heads, is the alleged undertaking of the vendor’s solicitor to indemnify him against McKay’s claim, and also to give him possession of the land in question.

The statement in Mr. Schofield’s affidavit as to the alleged indemnity, is as follows:—

Par. 5. “The said solicitor for said estate, *on behalf of said estate*, requested me to allow my name to be used in an action of ejectment against said John McKay, to recover possession of the said lands, to which I consented upon the terms which were agreed to by said vendor’s solicitor (Dixon), of being ‘indemnified and

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saved harmless for costs by said estate, and the said Dixon, acting on behalf of said estate, has frequently undertaken and promised to give me immediate possession, but I have never got possession pursuant to the conditions of sale."

In paragraph 7, in reference to the McKay suit, he says: "I was served with the said bill of complaint, and was persuaded by the said Dixon, acting on behalf of and as solicitor for the said estate, to answer the said bill and defend the said suit, he, the said Dixon, promising and agreeing on behalf of the said estate to indemnify me against costs, upon the faith of which promise and agreement I duly answered the said bill on the 19th April last.

Mr. Schofield, in support of his case, produces a number of letters which he alleges he has received from Mr. Dixon, the plaintiff's solicitor.

The first in order is dated January 6th, 1872. The only statements in this letter that appear material are: "I have made no arrangements with McKay (George), and have notified Hugh to do nothing in the matter without my concurrence"; and then in a postscript, "I will put any one you sell to in possession direct."

There is nothing in the affidavit of Mr. Schofield to shew that this letter relates to the matters in question in this cause, and it affords no internal evidence that it does.

The second letter is dated the 12th April, 1872. In it Mr. Dixon says: "McKays want to rent the farm for the summer. I have sent Rowland to see Huchn, if he is willing to give them a lease for the summer—i. e. George; if he is unwilling, I will bring the whole family up for petty trespass, under 25 Vict. ch. 22, and have Huehn to take possession in their absence." Then, in a postscript, "I had no idea that you were anxious to give me a defence, or I would have done so; it is not often that a lawyer sends grist from his own mill. Barrett does not intend to bring on the case till fall." Mr. Barrett, I observe, is the plaintiff's solicitor in the suit brought by McKay. This postscript therefore probably refers to Schofield's defence in the suit of *McKay v. Harper*; and from its tenor, it seems to me to be rather repugnant to the idea of Mr. Dixon having undertaken to indemnify Mr. Schofield against the costs.

On the 3rd May, 1872, Mr. Dixon writes: "*Re Harper*. I enclose you vesting order for Normanby lot. I charge you same as last, \$15, &c. I have not been able to do any thing with

McKay yet, on account of Huehn refusing to co-operate. If you have no objections to allow me to eject him in your name, I will stand between you and costs. I intend, however, to tempt him with an offer before doing so; but I think you can compel Huehn to carry out his bargain, as there is no valid legal objection to the title."

On 22nd May, 1872, he writes: "*Re McKay*. I have exhausted the law, and find no other means of proceeding than by a new writ, and I think the most I can do is to undertake (and this letter will be evidence of it) to keep you harmless from costs in endeavouring to eject McKay. As to your claim for loss on account of being kept out of possession, you can prefer that against the estate along with your bill for defending yourself against McKay. As you suggest, I will find the counsel in this cause, so that you will be only at the expense of the answer." These latter words are, I think, quite inconsistent with the idea that Schofield was to be indemnified against all costs he might incur in the suit of *McKay v. Harper*. But Mr. Dixon seems to have thought that even in offering to provide counsel he had done too much; for, before Mr. Schofield could in any wise be prejudiced by the retraction—the suit not coming on for hearing until the 26th September following—on the 27th May, 1872, he writes as follows: "*Re Harper*. As to defending your case at Court, I think, on mature consideration, I was fast in promising to do so in my last letter, and consequently recall it. I was thereby becoming personally responsible in the matter, which I will in no wise do. If you have a claim against the estate for defending your suit against McKay, you can make your claim direct. I do not appear for the estate. I appear for Mrs. Harper individually: the Court will appoint some one to answer for the children. If I go to Court and employ a counsel, I will be happy to allow him to attend to your part of the case: but the Court of Chancery are the only parties who can authorize me to defend for the estate, and consequently entitle me to costs from the estate. I do not think Mrs. Harper will be able to subpoena witnesses, and consequently my part of the case will be easily handled."

On 10th September, 1872, a few days before the suit of *McKay v. Harper* came on for hearing, Mr. Dixon again writes: "I am extremely surprised that you are under the impression that I am going to hire counsel and subpoena witnesses; the most I said, when in conversation with you, was, that one counsel would do, &c."

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The petitioner, I think, wholly fails to establish the alleged agreement on the part of the plaintiff's solicitor to indemnify him against the costs of the suit of *McKay v. Harper*. Mr. Dixon's letters, which have been produced, are so worded as to preclude that idea, and are well calculated to disabuse Mr. Schofield's mind of any misapprehension he might have formed as to Mr. Dixon's intentions. In the letter of the 22nd May, he is distinctly told he must prefer his claim (if any) against the estate; and in the letter of the 27th May a similar observation occurs. But that is a different thing from saying the estate will indemnify him.

The evidence as to the undertaking to deliver possession is not much stronger. The letter of the 3rd May, enclosing the vesting order, contains this passage: "If you have no objection to allow me to eject him in your name, I will stand between you and costs." And on the 22nd May, he says: "The most I can do is to undertake (and this letter will be evidence of it), to keep you harmless from costs in endeavouring to eject McKay. Both these undertakings are personal, and Mr. Dixon does not assume or pretend to bind the estate. He had been employed by Mr. Schofield to procure the vesting order, and he offered to eject McKay and keep Mr. S. harmless from the costs. Schofield says these undertakings were given by Mr. D. as the plaintiff's solicitor; but it was quite consistent with the other facts, that Mr. Dixon in giving these undertakings was acting as Mr. Schofield's solicitor, and intending to pledge only his personal responsibility. The onus of proving the alleged undertaking to indemnify is on Mr. Schofield, and he is bound to make it out clearly. The letters on which he relies as corroborative evidence that the plaintiff's solicitor agreed to indemnify him, lead me to a contrary conclusion I think, therefore, the case of the petitioner must stand on its own merits, and is not affected by any agreement with the plaintiff's solicitor as alleged.

There can be no doubt that in ordinary cases, where a purchaser accepts a conveyance of the land, executed by all necessary parties, his right to claim compensation is gone; and if he be evicted by a title to which his covenants do not extend, he cannot recover the purchase money either at law or in equity: *Cripps v. Reade*, 6 T. R. 606; *Johnson v. Johnson*, 3 B. & P. 162; *Maynard's case*, 2 Free. 1, 3 Swan, 651; *Anon*, 2 Free. 106; *Tylee v. Webb*, 14 Beav. 14; *Thomas v. Powell*, 2 Cox, 394; *Rawle on Covts.* pp. 613 *et seq.*

In cases of sales under the Decree of the Court, where there has been a misdescription in the particulars, as to the value of a rental, the Court has even after conveyance compensated the purchaser: *Cann v. Cann*, 3 Sim. 447.

So also, where at the sale it was stated that the growing crops would be sold with the land, and after sale they were removed by the tenant in possession, compensation therefor was allowed to a purchaser, even after he had taken a vesting order: *Stewart v. Hunter*, 2 Chy. Cham. 335. In that case, also, compensation appears to have been allowed for taxes; but whether the conditions of sale contained any stipulations as to their payment does not appear.

Where, however, a purchaser had bought at a sale under a decree, and having on an investigation of the title discovered an encumbrance, but without waiting to have it removed, paid his purchase money into Court and took his conveyance, he was held to be precluded from having the encumbrance paid out of his purchase money, and an application to the Court for that purpose was refused with costs, and he was held to be bound to rely on his covenants, *if any*: *Miller v. Pridden*, 3 Jur. N.S. 78.

It seems to me that there can be no difference in the position of a purchaser who pays his purchase money and takes a conveyance, and one who takes a vesting order, so far as the right to claim compensation is concerned. The vesting order being merely a statutory substitute for a conveyance: C. S. U. C. ch. 12, sec. 63.

If I am right in this conclusion, the cases of *Miller v. Pridden*, and *Thomas v. Powell*, seem to preclude the petitioner from getting any relief on this application, except as to the costs due to the T. & L. Co., as to which, I think the case of *Cann v. Cann*, 3 Sim. 447, and *Horner v. Williams*, Jon. & Ca. 274, apply on the ground that there was a misrepresentation in the advertisement as to the amount due to the company.

The fact that the land in question was in the adverse possession of McKay, was known to this purchaser before he obtained his vesting order. This was a most serious objection to the title. The fact that McKay was bringing a suit to establish an alleged claim to the property, was also known to him, and the purchaser had actually filed his answer in that cause before the vesting order was obtained. Had he come to the Court and applied to be relieved from his purchase on these grounds, there can be no doubt his application would have been suc-

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cessful: *Lachlan v. Reynolds*, 1 Kay, 52. Or if he did not desire to give up his purchase, he might have paid his purchase money into Court and insisted on possession being delivered to him by the plaintiff. Instead of adopting either of these courses, he arms himself with the legal estate by his vesting order, and I think the effect of his so doing was to waive all objections to the title, and to take upon himself the responsibility of getting possession. If the possession had been wrongfully withheld from him by any of the parties to the suit, he could have obtained a writ of assistance in this Court, and possibly compensation for loss sustained by its being so withheld: See *Thomas v. Buxton*, L. R. 8 Eq. 120. But the land being in the possession of a stranger, his only remedy to recover possession was by ejectment.

The fact that a purchaser by taking a vesting order gets no covenants for title, is no reason why he should have any greater claim for compensation than one who takes a conveyance with covenants, although it is a reason why he should use more than ordinary diligence to satisfy himself that the title is good, and that all encumbrances affecting it are discharged before he accepts the vesting order.

All the grounds of compensation, except the 2nd and 4th, are in substance so many items of damage flowing from the non-delivery of possession, and as such must be disallowed.

The claim for costs of defending the suit of *McKay v. Harper*, stands on no better ground. The naked facts seem to be, that McKay brought an ill-founded claim to the land. No authority that I have been referred to, establishes that this is a proper subject of compensation, and it seems to me an absurdity to suppose that a vendor is bound to compensate a vendee for defending himself against every wrongful suit that may be brought against him in respect of the lands sold.

The claim for the costs paid to the T. & L. Co. is allowed, and all other claims are disallowed.

The plaintiff's and defendants having offered to consent to the payment of the T. & L. Coy's. costs, before this application was made, the petitioner must pay the plaintiffs and defendants, and creditors, their costs of this application. The stop order, I presume, had better also be discharged by the order now to be drawn up, if the petitioner is willing.

RE TOBIN, COOK v. TOBIN.

Representative to deceased party—General Order 56.

An order had been made for the administration of the estate of an intestate, accounts had been taken under it, and the Master had made his report, but before it was filed or confirmed the administratrix died. No one could be found who was willing to administer to the estate, which was insolvent.

The Court therefore, under Order 56, made an order appointing as administrator *ad litem* the person who had been guardian of the infant heirs of the intestate on the application for the administration order, he having also been solicitor for the administratrix in her lifetime.

[Feb. 10, 1873.—*Blake, V.C.*, on appeal from Referee.]

This application was originally made to the Referee under Order 56, for leave to proceed in a creditor's suit without a personal representative of Moses Elthan Tobin, the intestate whose estate is being administered, or for an order appointing a representative. It was shown that the personal representative who was a party to the suit had died insolvent, the intestate had been insolvent at the time of his death.

The order was refused by the Referee.

Hoyles in appeal from decision of Referee. Order 56 is taken from Imperial Act 15 & 16 Vict. ch. 86, sec. 44. The decision of the Referee rested on *Silver v. Stein*, 1 Drew. 295, where it was held that section 44 does not apply where estate to be represented is that being administered. This case has been followed in *Bruiton v. Birch*, 22 L. J. Chy. 911; *Sherwood v. Freeland*, 6 Gr. 305, and *Toronto Savings Bank v. Canada Life Ins. Co.*, 13 Gr. 171, which are all distinguishable from the present one, and are overruled by later decisions: see *Joint Stock District Co. v. Brown*, L. R. 8 Eq. 376, where section 44 was held to apply to cases where the estate to be represented is that sought to be charged: see, also, *Jones v. Foulkes*, 10 W. R. 55; *Re Ranking*, L. R. 6 Eq. 601. In *Bliss v. Putnam*, 29 Beav. 20, which was an administration suit, the Court appointed a representative to the estate which was being administered. In this case there is a difficulty in obtaining a representative, owing to the insolvency of the estate, section 44 then applies: *Long v. Storie*, Kay, App. 12. After payment of incumbrances the estate is insolvent, and section 44 therefore applies: *Davies v. Boulcott*, 1 Dr. & Sm. 23. All adverse interests are represented, therefore *Gibson v. Wills*, 21 Beav. 620, is not adverse. The estate is in the best possible hands, is being made the most of,

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and cannot be prejudiced by the absence of a representative. If one is wanted, the infants' guardian is the most suitable, and his appointment would save expense.

BLAKE, V.C.—In this cause the administratrix of the estate of Moses Elthan Tobin deceased was, until her death, and her children are defendants. The suit is for the administration of the estate of Moses Elthan Tobin who died intestate, and his children now before the Court are his heirs-at-law and next of kin. During the lifetime of the administratrix the order for administration was made, the accounts were taken, and the Master made his report, but before it was filed or confirmed she died. The estate in question is insolvent. No person will administer to it, and the proceedings of the plaintiff are stayed until administration be procured, or unless the Court will act under Order 56, and either name some person to represent the estate in question, or allow the suit to proceed without such representative. The real question to be disposed of in the suit now is, how the assets are to be divided amongst the creditors of the estate. The next of kin and heirs-at-law virtually represent the estate, their object would be to make as much of the property as possible, to keep down the claims of the creditors, and generally to perform in this suit the same duties as would devolve upon a personal representative who might be duly appointed. In England at first the Court seldom acted under the clause in the statute from which our Order is taken; and to such an extent was its use limited that it became almost a dead letter. Of late, however, the clause seems to be enforced in a case where formerly it would have been held not to apply, and we find it laid down in 1 Dan. (5th ed.) 181, “It has been determined that the enactment extends to those cases where the estate to be represented is sought to be made liable.” In the *Joint Stock District Company v. Brown*, L.R. 8 Eq. 376, Sir W. M. James, then Vice Chancellor, says, in speaking of this statute: “I should certainly have held that the Act was intended to apply to every case where the Court might think it was doing justice in appointing a representative. I remember having something to do with the passing of the statutes, and I certainly understood the object of this enactment to be, to get rid of the great difficulty which arose from the want of representatives of a deceased defendant. It was intended that the Court should have power either to appoint a person to represent the estate or to go on without a representative, if it is considered that the

interests of the estate were sufficiently protected.” In *Tarratt v. Lloyd*, 2 Jur. N.S. 371, it is laid down that it is always in the discretion of the Court whether it will act on the power conferred by this section.

See, also, 2 Williams on Executors, 1863; Morgan's Chy. Stats. 201; *Chaffen v. Headlam*, 9 Ha. App. 46; *Swallow v. Binns*, 9 Ha. App. 47; *Goddard v. Haslam*, 3 W.R. 357; *Gibson v. Wills*, 21 Beav. 620; *Re Ranking*, L.R. 6 Eq. 601; *Jones v. Foulkes*, 10 W.R. 55; *Brueton v. Birch*, 22 L.J. Chy. 911; *Bliss v. Putnam*, 9 Beav. 20.

I think in this case that, as the interest of the deceased in the matters in question is of little, if of any consequence, as there is a substantial representation by those having an interest identical with that of the deceased, as the decree was pronounced and the accounts were taken while the estate was represented, as the main question left is the manner of the division of the assets of the estate, and as there is a difficulty in procuring administration to the estate of the deceased, I am justified in acting under the order in question. In doing so I do not intend in any way to interfere with the decisions in this Court of *Sherwood v. Freeland*, 6 Gr. 305, and the *Toronto Savings Bank v. Canada Life Assurance Co.*, 13 Gr. 171. The guardian of the infant children, who was also solicitor for the administratrix when alive, must doubtless be conversant with the affairs and accounts, and able to protect the estate; and the order I make is, that he be appointed to represent it for all the purposes of the suit.

The costs of the application before the Referee and of this appeal will be costs in the cause to the plaintiff.

HAYES v. SHIER.

Irregularity—Filing—Service of notice of filing—Con. Orders, 40, 43, and 46.

A paper mailed or delivered to a Deputy Registrar or other officer, elsewhere than at his office, to be filed, cannot be treated as a filing; but if he afterwards file the paper in his office, previous irregularities in its delivery to him are generally speaking cured.

When a pleading is filed in a Deputy Registrar's office in a County in which the solicitor for the opposite party does not reside, service of notice of filing must be effected according to Order 43. Service on the Toronto agent is irregular.

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Notice of filing not having been served on the same day that the pleading was filed, is not a ground for moving to take the pleading off the files. The proper course is to move to enlarge the time for taking the next step in the cause.

[February 13, 1873.—*Referee.*]

The circumstances under which this application was made appear in the judgment of the Referee.

Bain, for the plaintiff, the applicant.

W. R. Mulock, for the defendant.

MR. HOLMESTED.—The plaintiff applies to take a demurrer off the files for irregularity. The alleged irregularity being, (1) That the demurrer was not filed by the solicitor whose name is indorsed thereon; and (2) That notice of filing was not served on the day of filing as required by Order 46; and (3) That there is no agent's name indorsed on the demurrer.

The defendant's solicitor, Mr. Harding, resides in St. Marys; this suit is being carried on at Walkerton. The demurrer in question was forwarded to the Deputy Registrar at Walkerton by mail, and filed by him. The plaintiff's solicitor contended that the Deputy Registrar cannot properly file a paper in a cause unless the same be delivered to him by the suitor in person, or his solicitor, or the solicitor's clerk, or other agent of the party requiring it to be filed; and that a delivery through the post office was a nullity. I do not think it is. I think the Deputy Registrar might properly refuse to file papers forwarded to him through the post office. Yet if for his own convenience or the convenience of the profession he choose to receive and file papers so forwarded, I do not think the opposite party can properly object unless he is prepared to shew that he has thereby sustained some damage or been deprived of the opportunity of taking some proceeding; as for instance in this case, had the time for answering expired before the demurrer was filed, and had the plaintiff's solicitor been in attendance to note the bill *pro confesso*, I doubt whether the Deputy Registrar could properly insist on filing the demurrer received through the post office in preference to allowing the plaintiff to enter his note *pro confesso*, but nothing of that kind arises here, and if it did, the proper course would be to appeal to a Judge in Chambers, and not to the Referee.

Here the demurrer was mailed by Mr. Harding. He does not appear to have employed any

agent to file it. I see nothing in the orders which makes it compulsory on him to have done so. He might have gone to Walkerton himself and filed the demurrer, or he might have sent a clerk, or even an errand boy with it; and I do not think his having chosen the post office as a means of transmitting it to the Deputy Registrar has rendered its delivery a nullity as the plaintiff contended.

The provisions of the 40th Order have not been contravened. The delivery of the demurrer to be filed was made by Mr. Harding himself, and although it be (as the plaintiff contends) that that delivery took place at St. Mary's at the moment the letter containing the demurrer was posted (*Robson v. Arbuthnot*, 10 U. C. L. J. 186). Yet that can make no difference. For though it is true the delivery of a document to a Deputy Registrar in the street, or elsewhere than at his office, cannot be treated as a *filing* of such document; yet when the Deputy Registrar has taken the document to his office and duly marked it filed, any previous irregularities in the mode of its delivery to him are, generally speaking, cured: *Campbell v. Madden*, Dra. R. 2; *Gray v. Stacey*, 10 U. C. L. J. 245; *Fralick v. Huffman*, 1 Chancery R. 80.

The notice of filing appears to have been served on the Toronto agents of the plaintiff's solicitor on the day the demurrer was filed, and to have been forwarded to the plaintiff's solicitor by whom it is produced. When he actually received it does not appear.

The service on the Toronto agent was irregular, and not warranted by Order 42. The service should have been made in the manner prescribed by Order 43. But though the service was irregular on the agents, yet inasmuch as the notice was forwarded by them to the plaintiff's solicitor, it would nevertheless be good, as service on him on the day he actually received it: *Smith v. Roe*, 1 C. L. J. 155. What day that was he does not state. For aught that appears to the contrary, he may have received it on the same day it was served on the agents in Toronto. At all events that was a fact within his knowledge, and I think he should have made it clear.

But even if the service of the notice had been shown to have been too late, that seems no ground for taking the demurrer off the files. The proper motion in such case appears to be "to enlarge the time for taking the next step in the cause:" *Wright v. Angle*, 6 Hare 107; *Lloyd*

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v. *Solicitors' Life Assurance Co.*, 3 W. R. 640; and such applications are not encouraged where the neglect to give such notice is the result of a mere slip.

The motion is therefore refused with costs.

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Appeal bond.

A party opposing the allowance of a surety's bond for security for costs of an appeal, may read affidavits in opposition to the surety's affidavit of justification.

An appeal bond is properly entitled in the cause in the Court below.

[February 7, 1873.—*Referee*]

This application was made on the part of the defendants, for an order disallowing an appeal bond filed, on the following grounds: (1) that the plaintiffs refused to give information as to the property under which they qualify; (2) the amount of the bond was insufficient; (3) the bond was irregular, in not having an additional surety, on account of one of the parties being an infant; (4) the sureties had not sufficient property. It appeared that the party who had been an infant at the filing of the bill, was now of age.

Bain for the defendants argued that defendants could not impeach by counter affidavits the oath of the surety, but were compelled to rely upon cross-examination to make him indicate the source of his statements as to his property. The sureties here refused to give particulars of their property on demand, and on cross-examination their account of their property was unsatisfactory, it appeared to consist of printing plant. His contention was, that it did not appear to consist of property to the value of \$400 over and above their debts, which was *available on execution*. This, *Vankoughnet, C.*, had held, in *Pike v. Dixon* (unreported), was the sort of property of which a surety must be possessed. A speculative valuation of it was not sufficient. The former infant's name being retained in the style of cause, as an infant, was improper, as it rendered the bond apparently insufficient.

Snelling, for plaintiffs. The practice does not require a surety to furnish particulars of his

property on demand. His oath is sufficient. The party now of age is described in the style of cause as an infant, because the old style of suit should be preserved: *Upper Canada Mining Co. v. Attorney General*, 2 Chy. Ch. 185.

MR. HOLMESTED.—On the hearing of this motion I had some doubt as to whether a party opposing the allowance of a bond for security for costs, was precluded from filing affidavits in opposition to the surety's affidavit of justification. It was said by the defendants' solicitor that such affidavits were inadmissible, and could not properly be received, and that the defendants were compelled to rely on such evidence as they could extract from the surety by cross-examining him on his affidavit of justification. If the defendant had really been in this position, I think the evidence of the surety should probably be much more closely and critically weighed, than it should be if the defendants were at liberty to file affidavits in opposition. The 10th Rule of the Court of Error and Appeal provides expressly that the allowance of a bond given on an appeal from a judgment of a Court of Law, may be opposed by affidavit; and I think that rule applies also to the allowance of bonds given on appeals from this Court, and, even apart from the provisions of Rule 10, I think the respondent could oppose the allowance of the security on affidavit. I think the defendants therefore misconceived their rights.

See *Cliffe v. Wilkinson*, 4 Sim. 122; Dax, Master's office, 132. In case of bail at law, see Arch. Prac. p. 838, 11th ed.

The only property which I think Boyle can properly justify upon, is his printing presses and type. The other property he claims to own is not (it appears to me) in such a position as to afford a tangible security to the respondents. But the evidence as to the value of the types and presses (in the absence of any evidence to the contrary) is, I think, sufficient. I therefore hold that Boyle is a sufficient surety.

I think the bond is sufficiently and properly entitled, and that Joseph Patrick Campbell having come of age, properly joined in the bond, and that it was not necessary that any additional surety should be given, under Rule 3 of the Court of Error and Appeal Rules.

The application is therefore refused with costs.

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GRANT v. WINCHESTER.

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GRANT v. WINCHESTER.

Cross-examination of a party on affidavits—Security for costs—Uncertain abode.

The rule in force in England (Dan. Pr. 810) that a party who has made an affidavit must submit to cross-examination upon it, if required, on notice to his solicitor, before taking any further steps in the cause, being founded on a special English order, has no application in this Province.

A certificate of the state of the cause is only necessary where the application for security for costs is made before answer filed.

A plaintiff out of the jurisdiction, with no certain place of abode, and having no property in this Province, though stating on affidavit that she was only temporarily absent, and intended to return, was ordered to give security for costs, there being no circumstances from which the Court could reasonably infer that the intention to return would certainly be carried out.

[February 17, 1873.—*Referee.*]

On the 15th February, 1873, an application was made by the defendant for an order for security for costs, on the ground that the plaintiff had gone to reside out of the jurisdiction of the Court. In opposition to the motion, the plaintiff had made an affidavit of her intention to return to the Province.

Winchester, for defendant, produced a notice which had been served upon the plaintiff's solicitor, requiring the production of the plaintiff for cross-examination upon her affidavit. This had not been complied with, and he contended that the affidavit could not be read unless the plaintiff submitted to cross-examination upon it, citing Daniel's *Prac.* p. 810, (5th ed.)

W. R. Mulock, for the plaintiff. A solicitor could not be compelled to produce his client: *Spicer v. Dawson*, 22 Beav. 282. And the rule in Daniel was under a special English order. The motion should fail on the ground also, that no certificate of the state of cause was produced: *Torrance v. Gross*, 2 U. C. L. J. 212; *Hall v. Brigham*, 5 *Prac. R.* 464.

The REFEREE having reserved judgment to consider these preliminary questions, held that the rule referred to in Daniell was not applicable here, being founded on a special English order; and he over-ruled the technical objection as to the want of a certificate of the state of the cause, holding that it was only requisite on an application before answer, in order to shew that the

defendant had not taken any step in the cause, and so waived his right to security.

The motion was then argued upon the merits.

Winchester referred to *White v. White*, 1 Chy. Ch. 48; *Marsh v. Beard*, 1 Chy. Ch. 390; *Calvert v. Day*, 2 Y. & C. (Ex.) 217; and *Player v. Anderson*, 15 Sim. 104.

W. R. Mulock referred to *Blakeney v. Defaur*, 2 DeG. M. & G. 771; *Hoby v. Hitchcock*, 5 Ves. 699; *Green v. Charnock*, 1 Ves. 396; and *Kenaway v. Tripp*, 11 Beav. 588.

MR. HOLMESTED.—I think the defendant is entitled to an order for security for costs. It appears the plaintiff has no fixed place of residence in this Province, no home of her own, and no property here, except that in question in this suit. Since the institution of this suit she has gone as she says, on a visit to her daughter in the United States. She states herself "to be old and infirm," that she intends to return to this country in the coming spring, to remain and pass the rest of her days here. I think there is nothing in the circumstances of this case from which I can reasonably infer that this intention will be certainly carried out. The case is very different from that of a person engaged in some occupation which necessitates his temporary absence from the country, but from the nature of which occupation his return may also be predicated at no distant date. Here the plaintiff seems to have left Canada, not from any necessity, but of her own free will; she has no ties to bind her to this country, and (see *Marsh v. Beard*, 1 Chy. Ch. 390) it may be, that, either from her infirmities, or from choice, she may, notwithstanding the intention to return, elect to remain where she is. On her return to this country the order will be discharged on proper application.

The circumstances of this case are not within the principle of *Re Carroll*, 2 Chy. Ch. 305, inasmuch as there appears to be a *bona fide* contention here, whether the defendant owes the plaintiff anything at all, supposing the plaintiff to be unable to procure her husband's concurrence in the conveyance.

Order granted.

The order was subsequently discharged upon the plaintiff returning to the Province.

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Production of Documents.

The Court will not act merely upon an allegation, by a party seeking to protect documents from production, that they are not material, if it appear from their nature, or otherwise, that they may afford material assistance to the party seeking production in establishing his case.

Where a party, having a joint interest in documents with a stranger to the suit, has the sole legal possession thereof, production will not be ordered unless the suit be of such a nature that the Court can say that the party having the legal custody sufficiently represents the other party interested.

But in such case the party in whose possession the documents are, will be required to give discovery of their contents, and to furnish the information in his affidavit, on production, with as much particularity as was required in answering interrogatories as to documents, under the former practice.

[February 28, 1873.—*Referee.*]

This was an application made on behalf of the plaintiff, to compel the defendants, W. H. Walker and J. T. Pennock, effectually to comply with the order to produce, issued by the plaintiff in this cause, and to compel them to file further and better affidavits on production, and to produce and leave with the Deputy Registrar, at Kingston, the documents set forth in the 2nd schedule of the defendant Walker's affidavit.

The documents referred to in that affidavit in question, and the reasons for their non-production there set forth, were as follows :

“ * * * 3.—I also have the papers and documents set out in the 2nd schedule to this affidavit. The said documents have reference to my dealings with other policy-holders of the said company, or to matters unconnected with the plaintiffs' claim, and have no connection with the plaintiffs' claim, and have no relation to the matters in question in this suit, and could not in any way help or assist the plaintiff in this suit, as I believe, and I therefore object to produce the same. I also object to produce them, on the ground that one Edward S. Scranton, of New Haven, in the State of Connecticut, one of the United States of America, banker, has a joint interest with me and my co-defendants, the Pennocks, in the said papers and documents, and that he is not a party to this suit, and I object to produce the same in his absence. The said Edward S. Scranton is interested with us as is alleged in the 6th paragraph of our answer, filed in this

cause, and is entitled to two-thirds interest in the said purchases; and I hold the said documents for him as well as myself, and I know that the said Edward S. Scranton objects to produce the same.”

The documents in question were thus described in the 2nd schedule to Mr. Walker's affidavit :

1. Assignment from Edward Pridham to W. H. Walker, dated 7th March, 1871, of judgment against the Home Insurance Company, of New Haven, Connecticut, for \$5,306.77.

2. Agreement between Thomas Dawson, and George Dawson, and William H. Walker, dated 7th March, 1871, whereby the said Dawsons agreed to assign their claim against the said company, then in suit, to the said Walker.

3. Assignment from Thomas Dawson and George Dawson, to William H. Walker, dated 7th March, 1871, of said claim of theirs in suit.

4. Receipt from Dawson Bros. to William Henry Walker, dated 7th March, 1871.

5. Memorandum of unsettled losses in Canada under policies of said company, &c., taken from company's books, on or about 15th February, 1871.

It was alleged in the bill that the plaintiffs were creditors of the Home Insurance Company, which company became embarrassed, and the defendants Pennock and Walker, thereupon, on behalf of the company, set to work to buy up the claims of Canadian creditors, and succeeded in purchasing some of them; they then applied to the plaintiff to sell his claim, and in order to induce him to agree to their terms, represented to him that they had purchased other creditors claims at 50c. in the dollar (the price they offered to pay the plaintiff), and produced assignments of claims made apparently in consideration of 50c. in the dollar, and the plaintiff was induced by these representations to sell his claim for 50c. in the dollar to the defendants. He afterwards discovered that the defendants had actually paid a much larger sum than 50c. in the dollar to the other creditors for the claims which the defendants had represented to the plaintiff they had bought for 50c. in the dollar, and the plaintiff claimed that the assignment of his claim at 50c. in the dollar was obtained by fraud, and was void and should be cancelled.

The 6th paragraph of the defendants' answer, which was referred to in Mr. Walker's affidavit, was as follows :—

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"We say that we, and Edward S. Scranton, of New Haven, Conn., did purchase claims against the said company from the various holders thereof, but all such purchases were made on our own behalf, and with our own means, and not at all on behalf of said company; and the said company was not in any wise interested in such purchases; and the said claimants, who sold to us their said claims, including the plaintiff, knew at the time such purchases were made, that we were purchasing on our own account, and not on behalf of the company."

C. Moss, for the plaintiffs, contended that allegations by the defendants that the documents sought to be protected would not assist the plaintiff, in his case were insufficient if opposed to the character of the documents, or if it appeared to the Court that the contents of the documents *might* be material to the case of the party seeking discovery: *Kerr*, on Discovery, 97 & 173; *Bannatyne v. Leadar*, 10 Sim. 230; *Harris v. Harris*, 4 Ha. 179; *Saunders v. Furnival*, 2 Chy. Ch. 49; *Ferrier v. Atwood*, 12 Jur. N. S. 365. As to the second ground upon which the documents were sought to be protected, he drew a distinction between joint possession with a stranger to the suit, and joint interest. If the party merely had joint possession it was impossible for him to produce, and therefore the Court would not order production; but it was otherwise when the party had the sole legal possession, though only a joint interest: *Kerr*, 106; *Kettlewell v. Barstow*, L. R. 7 Chy. App. 686.

W. G. P. Casels, for defendants, argued that if merely the interest of absent parties in the documents appeared on the affidavit, production would not be ordered: *Kerr*, 68, 108 & 201. Under the former practice of interrogatories, and under the powers of cross-examination at present given, the defendants might perhaps be compelled to answer questions as to the contents of the documents, but there was no right to have them produced.

He cited *Reid v. Langlois*, 1 Mac. & G. 627, 636; *Taylor v. Rundell*, 1 Cr. & Ph. 104, 111; *Murray v. Walter*, 1 Cr. & Ph. 114, 124; *Burbridge v. Robinson*, 2 Mac. & G. 244; *Warrick v. Queen's College*, L. R. 4 Eq. 254; *Bovill v. Cowan*, L. R. 5 Chy. App. 495; *Hadley v. McDougall*, 41 L. J. N. S. 504, L. R. 7 Chy. App. 312; and *Nichol v. Elliott*, 3 Gr. 536, 545.

MR. HOLMESTED.—Having regard to the nature of the bill, and the particulars of the documents

set forth, I am somewhat at a loss to understand how the defendant Walker has ventured to swear that the documents in question "have no relation to the matters in question in this suit." Such a statement seems wholly out of place and inconsistent in an affidavit on production. If the defendant really did believe that these documents have no relation to the matters in question in this suit, why does he refer to them at all? The order to produce merely requires him to produce documents in his custody, power, or control, *which do relate to the matters in question* in this suit. I think the defendant, by referring to them in his affidavit, as he has done, must be taken to have admitted that they have some relation to the matters in question; and I think it quite obvious from the allegations in the bill, that the documents, numbers 1, 2, 3, and 4, may possibly have a *very material* relation to the matters in question, and may afford the plaintiff evidence which will assist him to establish his case: *Saunders v. Furnival*, 2 Chy. Ch. 49; *Girdlestone v. North British and Mercantile Insurance Co.*, L. R. 11 Eq. 197. The first ground therefore on which the documents are sought to be protected, I think, wholly fails.

With regard to the second ground of protection, set up in the affidavit, there is more difficulty. It appears that the assignments of the claims mentioned in the 2nd schedule have been made to Walker alone, that they are in his possession; but although he appears to be the sole assignee, Mr. Scranton, who is not a party to the suit, is beneficially entitled to a two-thirds interest in the claims assigned. Although Mr. Walker is therefore in the sole legal possession of the assignments, yet as to a two-thirds interest, he holds them, in the eye of this Court, simply as a trustee for Scranton. I think the authorities establish, under such circumstances, the title deeds under which the trustee holds will not be ordered to be produced in the absence of the *cestui que trust* (*Few v. Guppy*, 13 Beav. 457), unless the suit be of such a character as to enable the Court to say that the trustee sufficiently represents the *cestui que trust*; and I do not think the late case of *Kettlewell v. Barstow*, L. R. 7 Chy. App. 686, to which I have been referred, has established any different rule. In that case the defendant alleged as a reason for the non-production, "that divers persons, not parties to this suit, are interested therein respectively, and we have, to the best of our knowledge, information, and belief, particularly set forth, under the said heading, the nature of such interest, and the names and conditions in life of such

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persons respectively." It does, not, however, appear from the report what the documents were, or what was the nature of the interest therein of the persons not parties to the suit, and the judgment of the Court casts no light upon these facts. The judgment of the Court below was as follows: "The objection does not go far enough. To say that other persons are interested, is no ground for resisting production." The judgment of Lord Justice James, on appeal, is almost equally concise. He says: "The documents are not protected. If documents are in the joint possession of the defendant and a person not before the Court, their production will not be ordered, because the Court will not order the defendants to do what they have no power to do; but it is no ground for resisting production, that a person not before the Court has an interest in the documents." I do not think that this case can be said to establish that a trustee having the legal estate, and sole and legal possession of the title deeds, can be compelled to produce them in a suit in which the *cestui que trust* is no party, and where the latter objects to the production. Here the subject matter of the trust is a chose in action, but I do not think that makes any difference in the principle on which production is ordered. The point decided by *Kettlewell v. Barstow*, may probably have been this, that where a party is in possession of documents material to the questions in controversy, and of which he is legal and beneficial owner, he cannot excuse himself from producing them simply on the ground that other persons have a collateral interest in them; e.g., a person in business cannot refuse to produce his books of account merely because his customers have an interest therein, and might be prejudiced by the state of their accounts being disclosed: *Brown v. Perkins*, 2 Ha. 540; *Ord v. Fawcett*, 19 L.J. Chy. 487; *Telford v. Russkin*, 1 Dr. & Sm. 148. Nor can a party excuse non-production of material documents merely because his solicitor has a lien on them: *Goodchap v. Weaving*, 16 Jur. 586, and other cases collected in Kerr on Disc. p. 109, note (e); *Hercy v. Ferrers*, 4 Beav. 17. If this were the point determined, it was already well settled by authority; but as I have already said, the facts of the case of *Kettlewell v. Barstow* are meagrely reported, and it is therefore difficult to say what is the precise effect of that decision: I do not think it was intended to alter or extend the rule stated by Lord Cottenham, in *Taylor v. Rundell*; and as to the documents numbers 1, 2, 3, and 4, in the 2nd schedule, I think this case is governed by that rule, and in

the absence of Scranton I ought not to order them to be produced by these defendants.

But though a party may be excused from producing documents in his possession in which other persons, not parties, have a joint possessory interest with himself; yet it seems to be clear that a discovery will be ordered to be made by the party as to the contents of such documents, notwithstanding he cannot be ordered to produce them: *Taylor v. Rundell*, Cr. & Ph. 104.

V. C. Wood said, (in *Clinch v. Financial Corporation*, L.R. 2 Eq. 271): "The attempt has often been made, in one way or the other, to escape the personal order for production on the ground of the ownership of the documents being in a corporate or partnership body. I myself recollect, as a pleader, having attempted it unsuccessfully in *Taylor v. Rundel*. But it has always been decided that the *parties must give all the information in their power*, even if the documents be not in their possession in this sense, that they cannot be produced *without an order for the purpose*, because they are in the joint possession of the directors and others. The Court says, if you have any possession, that is enough. There may be grounds for not producing, but even then you must give discovery. *The defendants, therefore, must give all the information they can*. The plaintiff is entitled to the benefit of their oaths, and they must be ordered to make a further affidavit." And the reason for this rule is clearly stated by Lord Cottenham, in *Taylor v. Rundell*.

So also in the late cases of *Vyse v. Foster*, L.R. 13 Eq. 602, and *Hadley v. McDougall*, L.R. 7 Chy. App. 312, 41 L.J. N.S. 504. The Court held that discovery should be made, though production was not ordered by reason of the persons who were not parties being jointly entitled to the documents in question.

I think the defendants' solicitor admitted on the argument that this was the case, and that the defendants, although they were not bound to produce these documents, were liable to make discovery of their contents, and he contended that the defendant Walker had made a sufficient discovery by the affidavits which he had filed; and that if any further information were required by the plaintiff, he was bound to seek it by cross-examination of the defendant on his affidavit. In *Nicholl v. Elliott*, 3 Gr. 545, the Chancellor said: "The order of course, for the

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production of documents, supplies the place of ordinary interrogatories formerly introduced into the bill, and the affidavit in reply comes instead of the answer to that interrogatory. Whatever discovery therefore, a defendant would have been bound to give by answer, with respect to documents in his possession, ought now to be furnished by the affidavits in reply; and the ground upon which he relies to excuse production, should be stated with the same particularity. When the affidavit fails to furnish the discovery to which the plaintiff might be entitled, it will be competent for him to cause the defendant to be examined *viva voce*; and when that necessity arises, without a sufficient excuse, the costs of such a proceeding are to be borne by the defendant."

I think the discovery which the defendant has made is insufficient. A short statement, such as is contained in the 2nd schedule, would be quite sufficient if the defendant submitted to produce these documents; but where he objects to produce them, but is nevertheless bound to discover their contents so far as he is able, as I hold him to be, a different rule must prevail, and what would be amply sufficient where the documents themselves are produced, may be entirely insufficient in a case where they are not produced, and the opposite party is nevertheless entitled to a discovery of their contents. Now if the sufficiency of an affidavit on production is to be tested by what would formerly have been a sufficient answer to an interrogatory as to documents, I think the defendants' affidavit must be held insufficient. In *Hadley v. McDougall*, Lord Justice James said: "We cannot make an order, for production of documents, on a person who is not a party to the suit. The plaintiff may, if so advised, amend the bill, so as to make the defendant *set out all the entries himself*." So here, I think, the defendants are bound to set forth the contents of these documents, 1, 2, 3, and 4, under oath, so far as they are able. When an affidavit on production is defective on its face, I do not see any reason why the opposite party is to be driven to worm out what is wanting by means of a cross-examination. So long as he is able to rely on defects apparent on the face of the affidavit, I think he is entitled to come to the Court to compel the filing of a better affidavit. Here it does not appear by the affidavit of either of these defendants, that they have discovered the contents of the documents mentioned in the 2nd schedule, so far as they are able, and that they were bound to do: *Clinch v. Financial Corporation, supra*; *Taylor*

v. Rundell, supra. McDonnell v. McKay, 2 Chy. Ch. 141, does not apply, because there the defendant submitted to produce the books of account for inspection.

With regard to the document numbered 5, I think no sufficient excuse has been assigned for its non-production; that appears to me to stand on a different footing to the other documents. Document 5, is described as a "Mem. of unsettled losses in Canada, under policies of said company, &c., taken from company's books on or about 15th February, 1871." The mere fact that Scranton is interested in the claims purchased by Walker, as alleged in the passage from the answer which I have read, would not give him any right or title to this memorandum, and it is not suggested that he has any other interest in it. As to this document, therefore, the case seems to come within the authorities of *Brown v. Perkins*, and other cases before mentioned, as well as *Bovill v. Cowan*, and *Kettlewell v. Barstow*.

The defendants, therefore, must produce the document number 5, in the 2nd schedule, and file a better affidavit, discovering, so far as they are able, the contents of the other documents in the 2nd schedule. The costs of this application must be costs in the cause.

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Change of venue—Cause of action—Balance of convenience.

The locality of the cause of action is not much regarded in Chancery as a ground for changing the venue.

When the venue has once been laid a very large preponderance of convenience must be shown to change it, and, in investigating this, regard will be paid to the ability of witnesses to travel, and to the probability of a postponement of the hearing being the result of a change.

Between private individuals it is impossible to say that one class of witnesses will be more injured than another class by absence from home. Between a private individual and a public officer this may be considered.

[March 4, 1873.—Referee—*Blake, V. C.*]

This was an application by a defendant to change the venue from Kingston to Toronto upon the state of facts appearing in the judgment of the Referee.

S. G. Wood, for the defendant, cited *Mallory v. Mallory*, 2 Chy. Ch. 404; *Chard v. Meyers*, 2

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Chy. Ch. 391; *McMurray v. Toronto Grey & Bruce R. W. Co.*, 3 Chy. Ch. 133; *Rose v. Cook*, 2 Prac. R. 204; *Levy v. Rice*, L. R. 5 C. P. 119; *Fisker v. Smith*, 2 Chy. Ch. 491; *Church v. Barnett*, L. R. 6 C. P. 117; *Harper v. Smith*, 8 C. L. J. 171.

Ewart, for the plaintiff, cited *Moore v. Boyd*, 1 C. L. J. 184, and *Blackman v. Barnton*, (there cited), 5 C. B. N. S. 452.

MR. HOLMESTED.—This is an application by the defendant Mrs. Kirkwood to change the venue from Kingston to Toronto, and the application is based on two grounds, 1. Because the ‘cause of action,’ if any, arose in Toronto; and 2. Because the balance of convenience is in favour of the hearing of the cause at Toronto.

It appears from the pleadings that the suit is brought for the execution of a trust, the plaintiffs claiming to be entitled as *cestuis que trustent* to the benefit of a certain legacy bequeathed by their uncle to their father the defendant Noad, which legacy was directed by the testator to be invested in the purchase of certain bonds which were to be delivered to the defendant Noad, and the income therefrom was to be expended by him (as it is alleged) in support of the plaintiffs. The plaintiffs also allege by their bill that the bonds in question have been delivered by their father to the defendant Mrs. Kirkwood, by whom they have been sold, and the proceeds applied by her in breach of the alleged trust, and the bill seeks to make the defendants liable for the misapplication of the fund. It appears by the answer of the defendant Mrs. Kirkwood that the bonds in question were sold at Toronto, and that the proceeds thereof were paid away there. Mrs. Kirkwood, moreover, states in her affidavit on this application, and the allegations in the bill bear out her statement, that her co-defendant, the father of the plaintiffs, is utterly worthless; and that if the plaintiffs succeed in this suit, the burden of making good the alleged loss will fall entirely upon her. She, moreover, swears that “the transactions out of which this suit arose took place in the City of Toronto, and not in the City of Kingston,” and this statement is not denied. On the other hand it appears from the pleadings that the testator lived in Quebec, where it would seem the will under which the plaintiffs claim was made and that the plaintiffs all reside in or near the City of Kingston.

It appears to be a somewhat difficult matter to determine where a cause of action arises, the

difficulty being occasioned by the different constructions which are placed upon the words, “cause of action.” One view being, that the expression means “all the facts which together constitute the plaintiff’s right to maintain the action;” *Allhusen v. Malgarejo*, L. R. 3 Q. B. 343, per Blackburn, J. The other view being that it is “the act on the part of the defendant which gives the plaintiff his cause of complaint;” *Jackson v. Spittall*, L. R. 5 C. P. 552, per Brett, J. On this point the English Courts of Common law appear to be equally divided in opinion: *Cherry v. Thompson*, L. R. 7 Q. B. 573.

This difference of opinion arises on the construction of the statute, which provides that the Court must be satisfied “that there is a cause of action which arose within the jurisdiction in respect of the breach of a contract made within the jurisdiction,” Eng. C. L. P. Act, sec. 18, and it to some extent turns upon the collocation of the words of the statute, but the cases referred to ought to be a guide in settling where a cause of action arises for the purpose of a motion of this kind; but of course their usefulness for that purpose is impaired by reason of the conflict of opinion which they present.

In the present case, if by “cause of action” is meant “all the facts which together constitute the plaintiff’s right to maintain the suit,” then it is obvious that it did not arise wholly in Toronto, the fact of the due making of the will under which the plaintiffs claim being a material element in the case. If, on the other hand, it merely means “the act of the defendant which gives the plaintiffs their cause of complaint,” then I think that the cause of action or suit did arise in Toronto; and for the purposes of a motion of this kind it seems to me the latter rule is the proper one to adopt. I therefore hold, though with some hesitation, that the cause of suit arose in the present case in Toronto.

But it seems that the fact of the cause of suit having arisen here would not of itself at law be a sufficient ground for changing the venue to Toronto, nor would it cast upon the plaintiff the burthen of showing that the preponderance of convenience is in favour of the hearing taking place at Kingston. Willes, J., in the late case of *Church v. Barnett*, L. R. 6 C. P. 118, 119, thus states the practice: “With respect to the supposed resolution of the Judges in *De Rothschild v. Shilton*, 8 Ex. 503, (cited in *Moore v. Boyd*, 1 C. L. J. 186; *Diamond v. Gray*, 5 Prac. R. 33,) I repeat that it is not correctly represented, inasmuch as it suggests that it is suffi-

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cient for the defendant to rely on the fact that the cause of action arose in the County to which he seeks to have the venue changed, *unless the plaintiff shows that the cause may be more conveniently tried in the County in which it was originally laid, or other good reason why it should not be changed. That is not so.* If it were so, the attempts would have succeeded which were made in numbers soon after that supposed rule was published, upon the simple affidavit I refer to. *That part of the suggestion of the committee was never adopted by the Judges.* If it had been, a rule of Court would have been made. A plaintiff therefore has a right to lay his venue where he thinks proper. If he does so capriciously, a Judge will change the venue to the place where the cause of action arose. But where he has not exercised a capricious choice, the defendant who seeks to deprive him of an undoubted right, *must show that there will be a practical preponderance of convenience in trying the cause in the place where the cause of action arose.*"

If this be a correct statement of the practice at law, as I assume it to be, and if I am to be guided by that rule, as I think I should be, I do not think it can be said either that the plaintiffs have capriciously selected Kingston as the place of hearing, or that the defendant has shown "that there will be a practical preponderance of convenience" in trying the cause in Toronto. So far as the number of witnesses is concerned, it appears that the plaintiff has as many witnesses residing in Kingston as the defendant has in Toronto. The difference in expense would appear to be only \$10, and that difference is in favor of Kingston. The defendant's witnesses, however, are all engaged in business in Toronto, two of them are practising barristers, one a banker, and another an insurance inspector, to all of whom an enforced absence from Toronto for four or five days would probably prove a source of some injury and inconvenience. The plaintiff's witnesses on the other hand, with the exception of one who is the manager of a bank, do not appear to be engaged in any occupation which would render an absence from their homes for a few days so injurious or inconvenient.

The sittings, however, at Kingston are generally of much shorter duration than at Toronto, fewer causes are, as a rule, entered for trial, and there is a likelihood on that account that there would be less delay in bringing the cause on for hearing at Kingston than there would be at Toronto; where, owing to the number of causes, witnesses are often necessarily kept many days

in attendance. Then again, the time for setting down causes having expired, it may be that leave could not be obtained to set the cause down now for the coming sittings, in which case the trial of the cause would be seriously delayed.

On the whole, therefore, I think I should refuse this motion. The costs will be costs in the cause to the plaintiff.

From this decision the defendant appealed on 4th March, 1873.

BLAKE, V. C.—In motions to change the venue the locality of the cause of action has in this Court never been very much regarded. The question was fully considered at a time when liberty was given to a plaintiff to file his bill where he pleased, and then it was held that the reference under a decree, was to be, in ordinary cases, to the Master *in whose office the bill was filed*, (see *Macara v. Gwynne*, 3 Gr. 310), and a very large preponderance of convenience had to be shewn to change a reference once made. The same principle is applicable to motions to change the venue, and I do not see such a preponderance of convenience in this instance; for upon the evidence I must conclude that there are, for the plaintiff, two witnesses resident at Kingston, and for the defendant five or six resident at Toronto. It is quite impossible, as a general rule, to enter into the investigation whether one class of witnesses will be more injured than another by absence from home. There is a difference in the case of a public officer, as is shewn in *Fisken v. Smith*, but between private individuals this cannot be taken into consideration. Here, those resident at Kingston are shewn to be very infirm, and regard should be paid to the age of the witnesses and their ability to travel, or if the venue be laid at a distance from the residence of such witnesses they may not be able to attend at the place of trial, and thus their evidence would have to be taken by the unsatisfactory means of a commission in place of orally before the Court. Regard must also be had to the fact that a postponement of the hearing would be the probable result of granting the order, and this through no fault of the defendant.

I must therefore dismiss this appeal.

Appeal dismissed.

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BUELL v. FISHER.

Immediate sale—Chambers.

An order for an immediate sale will not be made in Chambers, where the Master, pursuant to a decree made in Court, has fixed a day for payment, and it has not arrived. The motion must be made to the Court.

[February, 14, 1873.—*Referee.*]

English, for the plaintiff.

J. Hoskin, for the infant defendants.

MR. HOLMESTED.—The plaintiff has obtained a decree for sale in the usual terms, as provided by order 441. The Master has made his report, giving the defendants six months to redeem. He has, however, specially certified that he considers an immediate sale would be beneficial for all parties. The plaintiff now moves for a final order for sale, notwithstanding the six months allowed by the Master for redemption has not expired. The decree was pronounced in Court. The only conditions on which I can grant a final order, are those stated in order 451, viz.: “In default of payment being made according to the report.” To make the order now asked, would be in effect to vary the decree.

The cases to which I have been referred, (*Newman v. Selfe*, 33 Beav. 522; *Mears v. Best*, 10 Hare App. 51, 74; *Cayley v. Colvert*, 2 Chy. Ch. 431), do not, I think, warrant the present application, they merely shew that the Court has a discretion to direct a sale at once, without giving the usual or any time to redeem; and on this point no authority was needed, as it is expressly provided by order 428, that the Court may exercise this discretion. Here, however, the cause was heard in Court, and the Court has not thought fit to exercise the discretion, nor to direct the Master to make any enquiry with a view to the future exercise of such discretion. I am therefore of opinion that I have no jurisdiction to grant the order asked. *Cayley v. Colvert* does not apply, because in that case the application for immediate sale was made on the motion for decree in Chambers. In this case too, the defendants are infants, and therefore unable to consent to waive the usual time for redemption.

Order refused.

SMITH v. SMITH.

Interim alimony.

A plaintiff makes out a *prima facie* case for interim alimony by producing (1) an office copy of the bill (which need not be verified by affidavit), and (2) proof of marriage; but if the defendant oppose the application on the ground that the plaintiff has ample means of support, unless she can shew the contrary to be the case her application will be refused.

[Feb. 24, 1873.—*Strong, V.-C.*, on appeal from *Referee*.]

Mr. Ermatinger (Read & Keefer), on 20th February, 1873, moved for an order for interim alimony. He read the bill, and the marriage of the plaintiff and defendant was admitted by the answer.

Spragge, contra, contended that the plaintiff should shew want of means further than by the allegations of the bill, citing *Bradley v. Bradley*, 3 Chy. Ch. 329. No affidavits on this point had been filed.

The REFEREE, on the authority of this case, refused the order.

This decision was appealed from.

Read, Q. C., for the plaintiff, cited *Brown v. Brown*, 2 Hagg. Eccl. Rep. 5; *Nolan v. Nolan*, 1 Chy. Ch. 368; *Soules v. Soules*, 3 Gr. 113, 434; *Roger's Eccl. Law*, 38; and *Goodhem v. Goodhem*, 2 Sw. & Tr. (Prob. Rep.) 250.

Hoskin, Q. C., contra, contended that an affidavit verifying the bill should be produced to prevent the institution of a vexatious suit for alimony.

STRONG, V. C., granted the order, holding as above stated.

MERCHANTS BANK v. TISDALE.

Production of documents—Materiality of discovery to the issue.

Before decree no discovery will be ordered which appears to the Court to be immaterial to the question to be tried at the hearing.

[March 7, 1873.—*Referee.*]

Evans, for defendant, moved for a better affidavit on production by the plaintiffs.

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MERCHANTS BANK v. TISDALE—CRESWICK v. THOMPSON.

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Rae, contra.

MR. HOLMESTED.—The bill in this case is filed for the foreclosure of a mortgage made by the defendant. The defendant in his answer sets up that he was liable for the debt for which the mortgage was given as surety for one James Brown, and that James Brown and one Thistle were also liable to the plaintiffs (the Bank) for another debt. That Brown gave a mortgage to secure both debts, viz., the one for which the defendant Tisdale was liable as his surety, and also the debt for which Brown and Thistle were liable to the plaintiffs ; and it is alleged that the plaintiffs agreed with the defendant Tisdale, that the proceeds of Brown's mortgage should be applied *pro rata* in reduction of the two debts, and that defendant thereupon executed the mortgage in question in this suit.

The defendant further alleges that the plaintiffs have realized part of the moneys secured by Brown's mortgage, but have applied no part of such proceeds in reduction of the debt for which defendant was liable. He also alleges that the plaintiffs have compromised the debt due by Brown and Thistle, so far as the latter's liability is concerned, and have accepted a less sum than was due in satisfaction, and that such arrangement was made without defendant's knowledge or consent. The defendant claims that the Thistle debt should be taken to have been paid in full by Thistle, and that the moneys realized from the Brown mortgage should be applied first in liquidating the mortgage given by Tisdale the defendant. These allegations are put in issue by the replication. An order for production has been obtained by the defendant, and the main question on the present application is, whether the plaintiffs can be compelled before the hearing to produce documents in their possession relating to the Thistle debt.

The cases referred to in Kerr on Discovery, p. 164, *Adams v. Fisher*, 3 My. & Cr. 526, and others, seem applicable here. And according to the principle followed in those cases, I do not think the defendant entitled to the discovery he seeks, because it appears to me that it is immaterial to the question to be tried at the hearing. The questions to be tried at the hearing are these, 1. On what terms was Brown's mortgage held by the Bank ? And, 2. On what terms did defendant execute his mortgage ? Those questions do not depend for their solution apparently on any discovery that could be obtained in reference to the Thistle debt. If the Court should find that these mortgages were held by

the plaintiffs on the terms alleged in the defendant's answer, then in taking the accounts, a discovery as to the Thistle debt may become material to the defendant ; until then, however, it seems to be premature, and ought not to be granted.

The affidavit on production, however, being defective in other respects, mentioned in the notice of motion, a better affidavit must be filed.* Costs will be costs in the cause.

CRESWICK v. THOMPSON.

Opening biddings—General Order 388—Special grounds.

The Court is strongly disinclined to open biddings unless very special grounds are shewn.

The fact alone that a price can be obtained in advance upon that realised at the sale, does not constitute such a special ground.

An inadequate description of the property in the advertisement will be a sufficient ground, if calculated to mislead or deter the public from purchasing, but not otherwise. Objections of this kind amounting only to a complaint that all the advantages of the property have not been sufficiently dwelt upon in the advertisement should be taken upon the settling of the advertisement.

[March 8, 1873.—*The Referee.*]

W. Mulock, on behalf of the infant defendant, moved to open the biddings. The grounds of the application were (1) an offer had been received in advance of the amount realized at the sale ; (2) the advertisement, the material part of which is set out in the judgment, did not state the value of the lands, arising from the timber upon them, with sufficient particularity ; (3) the increase in price would be of benefit to the infants. He cited *Harrison v. Paterson*, 1 Chy. Ch. 363 ; and *McDonald v. Gordon*, 2 Chy. Ch. 125. The report on sale was not confirmed.

C. Moss, for the purchaser at the sale said, biddings were only opened on some special

* A better affidavit was ordered on the grounds that the affidavit filed was made by the cashier of the Bank, personally, and not as cashier, and did not negative possession by the Bank of certain documents. Whether the plaintiffs, a corporation, were bound to file any affidavit at all under the common order to produce, is doubtful : See *Lindsay Petroleum Co. v. Pardee*, before Referee, February 6, 1874. This point however was not raised.—*REP.*

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grounds, such as fraud, and this only when affecting the purchaser: *Monice v. Bishop of Durham*, 11 Ves. 57; *Fergus v. Gore*, 1 Sch. & Lefr. 350; *White v. Wilson*, 14 Ves. 151, and there was no distinction in this respect between applications before and after a report on sale was confirmed: Order 388. The *onus* of shewing such special circumstances affecting the purchaser was upon the applicant. Even misconduct in settling an improper advertisement, would not affect a purchaser, who was a stranger to the suit: *Crooks v. Crooks*, 2 Chy. Ch. 29; *Dickey v. Heron*, 1 Chy. Ch. 149. In *McDonald v. Gordon* the purchaser was a party. A misdescription was at most a ground for staying the sale: *McAlpine v. Young*, 2 Chy. Ch. 171. The leaning of the Court was against opening biddings as tending to throw discredit upon all Chancery sales, and in England the practice was forbidden by statute 15 & 16 Vict.

Spragge, for the plaintiffs. An advertisement settled and approved by the Master could not, in Chambers, be appealed from. The plaintiff was entitled to hold the present purchaser to his bargain, and should not be required to run the risk of having a less solvent one substituted. He cited *McRoberts v. Durie*, 1 Chy. Ch. 211; *Dickey v. Heron*, 1 Chy. Ch. 149, and *Brock v. Saul*, 2 Chy. Ch. 145.

MR. HOLMESTED.—General Order 388 provides that the biddings are only to be opened on *special grounds* whether the application is made before or after the report stands confirmed.

Here the motion is based on two grounds, 1. That the description of the property in the advertisement of sale was insufficient; 2. That an advance of \$620 on the price obtained, viz., \$4380, is offered.

I think it clear from the cases, (*Ware v. Watson*, 7 DeG. M. & G. 739) that the second is not "a special ground" within the meaning of the Order, and that if that were the only ground relied on I have no doubt the motion ought to be refused.

The first ground taken, however, is of a different character, and it is necessary to consider whether, under the circumstances, it is one that should prevail. The property sold contains 240 acres, and consists of lots 20 in 3rd concession, Vespra, and 20 and 21 in the 2nd concession, Vespra. The description in the advertisement was as follows:—"About 45 or 50 acres are cleared and under cultivation: about 12 or 15

acres of hardwood on the remainder are untouched. The farm is distant two miles from Barrie, to which there are good roads; on it are a frame dwelling-house, barn and stable, and a well. The cleared part is fenced." It is said that this description is defective that there are in fact 100 acres of hardwood upon the premises, a cedar swamp of 40 or 60 acres; and that the farm instead of being distant two miles from Barrie, as stated in the advertisement, is in reality nearer: the nearest part of the land being within sixty rods of the limits of the town, and only a mile and a-half or a mile and a-quarter from the town hall.

The evidence in support of these facts is not contradicted, although it must be confessed it is not of a very satisfactory character. Mr. Clark, on whose evidence the applicants rely, is the person who desires to purchase the lands. His examination of the lands seems not to have been of a very thorough description, and his estimate of the quantity of woodland and swamp, and of the distance of the premises from Barrie, seems to rest entirely on the result of a visit which occupied only between three and four hours, including the time going from and returning to Barrie.

But assuming all Mr. Clark's impressions are accurate and well founded, I am not prepared to say that the advertisement is so grossly deficient as to be calculated in any way to mislead or deter the public from purchasing. It is quite true that the statement as to there being 100 acres of woodland on the premises, and 60 acres of cedar swamp, might very properly have been inserted in the advertisement, and might possibly have had some influence in attracting bidders. The question here is, whether the omission of those statements is fatal to the validity of the sale? I do not think it is. The proper time to take any exceptions of that kind to the advertisement as settled by the Master, is before the sale takes place: *Baxter v. Finlay*, 1 Chy. Ch. 230; *Heward v. Ridout*, 1 Chy. Ch. 245. After the sale has taken place, it must be a very strong case indeed that will induce the Court to set aside a sale on the ground that all the advantages of the property have not been sufficiently dwelt upon and described in the advertisement of sale, (see *Crooks v. Crooks*, 2 Chy. Ch. 29), and that is really all that the present objection amounts to.

The advertisement here is silent as to the amount of woodland; all it asserts is, that "12 or 15 acres of hardwood on the remainder are

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untouched." It appears from Mr. Clarke's cross-examination that some 20 acres of the land have been culled over, and I presume it was with reference to this fact that the advertisement was worded as it is.

It is impossible to conjecture what the effect of such an omission as is complained of here would be. Here there is no positive evidence that any person was in the least degree misled or debarred from bidding. Mr. Clark's affidavit is so drawn as to lead to the inference that he was misled by the description, and that he would have bid at the sale the price he now offers had he then known the lands were so well timbered; but this statement, as appears from his cross-examination, is extremely disingenuous to say the least, and it is clear that his failure to bid the sum he now offers, at the sale, arose from an entirely different cause, namely, the fact of his not having sufficient funds with him to pay the deposit required to be paid at the sale.

In *McDonald v. Gordon*, 2 Chy. Ch. 125, an agent for one of the parties to the suit had purchased, and the biddings were opened on the ground of the sale having taken place subject to a condition which the Court held both to be unnecessary and unwarranted by the practice of the Court, an advance of twenty per cent. on the amount bid at the sale being also offered.

But that case stands clearly distinguishable from the present in two most important points; the purchaser was a party to the suit, (see judgment *McAlpine v. Young*, 2 Chy. Ch. 171, 175, and see 1 Chy. Ch. 151), and not a stranger as is the case here, and there the objection to the advertisement was, that it contained something that should not have been inserted, which was both unreasonable and improper, and which must of necessity have bad effect on the sale.

But to advertise a lot for sale subject to a condition that you shall not be bound to make out any title to it, is a very different thing from omitting to say that it contains 100 acres of good timber.

It is in very rare cases that a vendor can obtain any compensation for an inadequate description, and this is not a case in which it could be obtained: *Dart*, 595, and see *Griffiths v. Jones*, W. N. 1873, p. 47. The cases in which purchasers have obtained compensation for misdescriptions when more has been advertised for sale and sold than the vendor actually had to sell, proceed on a different footing, and I do not see that they afford any analogy to the present

case. Generally speaking a vendor must be presumed to know the peculiar quality and advantages of the thing he sells; and except in cases where the vendee has some special knowledge the concealment of which amounts to a fraud on the vendor, a vendor cannot claim compensation or an increase of price merely because of his ignorance of the value of his property.

The alleged misdescription as to the distance of the premises from Barrie, was not relied on on the argument, and I do not think that it was calculated to mislead any one. The limits of many country towns such as Barrie extend, as is well known, for a considerable distance beyond the part of the town which is actually built up, but in reading an advertisement of this kind people are not likely to assume that the extreme limit of the town is meant, but rather that part of it which is settled and built up, and in doing so I do not think they could be materially misled by the advertisement in this case. The conclusion I have come to, therefore, is, that no special grounds within the meaning of the Order have been shewn; and bearing in mind the very strong expressions of disapproval which have been frequently used by the Courts as to the practice of opening biddings, and the inadvisability of extending that practice: See *Barlow v. Osborne*, 6 H. L. C. 556; *McRoberts v. Durie*, 1 Chy. Ch. 211; *Dickey v. Heron*, *Ib.* 149; *Crooks v. Crooks*, 2 Chy. Ch. 29. I think the motion should be refused. The purchaser will be entitled to deduct his costs from the balance of purchase money, and the costs of all other parties must be costs in the cause. From the costs allowed to the purchaser must be deducted the costs he was ordered to pay on opening this motion.

Motion refused.

MCKAY V. HARPER.

Guardian ad litem being the nominee of the plaintiff—Costs of guardian—When paid out of fee fund.

A solicitor, upon the plaintiff's application, having been appointed guardian *ad litem* to infant defendants, and being unable to recover his costs from the plaintiff or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund.

[March 10, 1873.—*Chancellor on appeal from Referee 1*

Mr. T. Dixon had been appointed guardian *ad litem*, by the Master at Owen Sound. The plain-

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tiff's bill was dismissed with costs. The guardian having issued execution for his costs, and being unable to recover them from the plaintiff, presented his petition showing these facts, and that the infants had no estate, and he prayed for payment out of the fee fund.

J. C. Hamilton, for the guardian.

Hoskin, Q. C., solicitor to the Fee Fund, opposed the application on the ground that the guardian, being the nominee of the plaintiff's solicitor, was improperly appointed.

Hamilton denied that this was the case, and replied that such objection should have been taken at the time of the appointment, but now that the Master, in his discretion, had made the appointment, it should be upheld.

The following authorities were cited: *Fraser v. Thompson*, 4 DeG. & J. 659; *Thomas v. Thomas*, 7 Bea. 47; *Clements v. Arnold*, 3 Chy. Ch. 75; Morgan's Chy. Orders, 141 & 559; and Taylor's Orders 130, Ord. 36.

THE REFEREE.—This matter originally came before me *ex parte*. The applicant, Mr. Thomas Dixon, a solicitor of this Court, applied for an order for payment to him out of the "suitors' fee fund," of the costs incurred by him as the guardian *ad litem* of the infant defendants, on the ground that he was unable to recover the amount either from the plaintiff who had been ordered to pay them, or from the infants' estate. I refused to entertain the application *ex parte*, and directed that the solicitor to the fee fund should be notified of the application. This has been done.

From the certificate of the Deputy Registrar, by whom Mr. Dixon was appointed, it appears that the plaintiff and Mr. Dixon, both personally appeared before him on the application to appoint a guardian *ad litem* to the infant defendants, and it was at their request, (*i.e.*, as I understand the certificate of the plaintiff's solicitor and Dixon) that the latter was appointed. I think from this certificate I must infer that Mr. Dixon attended on the motion, at the instance of the infants or their friends, and was appointed guardian, as their nominee; at all events, he cannot be said to have been the nominee of the Court.

It was held in a recent case, *Clements v. Arnold*, 3 Chy. Ch. 75, that a guardian so appointed is not entitled, as a matter of course, to costs, even

against the plaintiff, the distinction being there drawn between the rights of a guardian who is the nominee of the Court, and one who is the nominee of the infant or his friends.

If the latter is not entitled to an order of course for costs against the plaintiff, I think it necessarily follows he can have no special claims on the suitors' fee fund. The English cases to which I have been referred by Mr. Hoskin, show that even a guardian *ad litem*, who is the nominee of the Court, has no right to an order for payment of his costs out of the suitors' fund: *Fraser v. Thompson*, 4 DeG. & J. 662; *Harris v. Hamlyn*, 3 DeG. & S. 470. The utmost he is entitled to is an order against the plaintiff. But this Court has not followed that rule, and I find in two cases orders were made directing payment of the costs of a guardian *ad litem* out of the fee fund. In *Mole v. Emery*, the order was made by his lordship the Chancellor, 21st September, 1870, and in *Totten v. Cassidy* a similar order was made by the Referee, on 11th September, 1872, after consultation (as he informs me) with V. C. Mowat, who had heard the cause.

Mr. Taylor tells me, that in both these cases the guardian was the nominee of the Court, and it was on that ground that the guardian was held to be entitled to indemnity from the fee fund. I have referred to the order in the case of *Fawcett v. Fawcett*, made on the 5th September, 1870, to which I have been referred by the petitioner. The suit appears to have been a suit for alimony, in which the plaintiff applied for leave to prosecute the suit *in forma pauperis*, and on such application Mr. Hoskin was assigned as her solicitor. On his failing to recover his costs from defendant, the Court, under the peculiar circumstances of the case, granted an order for the payment of Mr. Hoskin's costs out of the fee fund; one of the peculiarities of the case being (as Mr. Hoskin states) that the whole amount collected by him for the defendant was, by the special direction of the Court, paid over to the plaintiff.

Mr. Hodgins (*amicus curiae*) stated that a similar application to the present had been made by him in the case of *Searight v. Searight*, and that the Chancellor before whom the application was made had refused it.

On the whole I do not think there is any precedent for this application, and must refuse it with costs.

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The motion was subsequently renewed, and a further certificate was produced from the Master, certifying that his former certificate was erroneous, and that Mr. Dixon had not attended on the application for the appointment of guardian; although it appeared by affidavit that the plaintiff's solicitor had suggested Mr. Dixon's name.

The Referee still refused to grant the application, and motion was made by way of appeal to the Chancellor.

THE CHANCELLOR.—Of the cases cited, the only one in which it was made to appear that the costs of the guardian could not be made either out of the plaintiff or out of the infants' estate, is that of *Gilmor v. Gilmor*, (Reg. Book, 29th Oct. and 10th Nov. 1864), and in that case it appears, upon reference to the late Chancellor's note book (Nov. 10th, 1864), and the order book, that the Chancellor, after considering upon the first application whether such order could properly be made, did, upon it being made to appear that the infants' costs could not be made out of the plaintiff, direct that they should be paid out of the fee fund. I make the like order in this case, and the guardian is to have his costs of the application before the Referee; and here Mr. Hoskin, solicitor to the fee fund, having been directed to appear upon this application, is also entitled to his costs out of the same fund.

GRANT V. WINCHESTER.

Security for costs—Limiting time for putting in security.

On an application to limit the time for putting in security for costs, a plaintiff was allowed the same length of time as she would have had for answering the bill, if she had been a defendant, such time to date from the application to limit the time.

[March 25, 1873.—*Referee.*]

Winchester, for defendant, applied for an order limiting the time within which the plaintiff should give security for costs.

W. R. Mulock, for plaintiff. Eight weeks' time should be given, dating from the application, being the time within which the plaintiff, if a defendant, would have to answer: *Giddings v. Giddings*, 10 Beav. 30; *Wood v. Grey*, Taylor's Orders, p. 293.

Winchester contended that it should be computed from the date of the order for security.

THE REFEREE fixed eight weeks, dating from the application to limit the time.

MCGILLIVRAY V. McCONKEY.

Amendments—Costs.

A plaintiff will not be permitted to convert a bill by amendment into a new bill for different relief.

If in making such amendments as, subject to this restriction, he is justified in making, a plaintiff *strikes out* allegations so as to render the answer to them useless, an application may be made by the defendant answering for his costs thus unnecessarily incurred.

Such application should be made at the hearing.

After answer, liberal *addition* to the bill by amendment, retaining the original allegations, is proper, even though rendering a new defence necessary, and the costs of such amendment are proper costs in the suit.

[March 31, 1873.—*Blake, V.C.*, on appeal from *Referee.*]

This application was one made by the defendants to take the amended bill off the files, as being merely the original bill converted by the amendment into a new bill for a different object.

The facts of the case appear in the judgment of the Referee.

C. Moss, for the defendants, cited *Attorney-General v. Cooper*, 3 Mil. & Cr. 258–60; *Danl. Pr.* 5th ed. 350; *Lewis Eq. Draft.* 276; *Crawford v. Bradburn*, 1 Chy. Ch. 280.

Ewart, contra, cited *Smith v. Smith*, G. Coop. 141; *Butterworth v. Bailey*, 15 Ves. 358; *Allen v. Spring*, 22 Beav. 617; *Parker v. Nickson*, 11 W. R. 635, 4 Giff. 311; *Monck v. E. of Tankerville*, 10 Sim. 284; *Mavor v. Dry*, 2 S. & S. 112.

THE REFEREE.—The bill as originally filed in this cause alleged that the plaintiff was entitled to the land in question under a contract with the Crown for the purchase, and that before the patent issued he mortgaged the land to McConkey and that he (McC.) subsequently obtained the patent in his own name; it further alleged that the plaintiff had subsequently agreed that McConkey should convey the land to plaintiff's son who was to give McConkey a mortgage for the

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amount due to him from the plaintiff, and that the plaintiff was to get an absolute deed of five acres of the lot. This arrangement was carried out, and the plaintiff's son it was alleged conveyed the equity of redemption in the land to the defendant Sutherland, who the plaintiff contended was bound to protect the plaintiff's five acres from the mortgage to McConkey, and the plaintiff claimed to redeem McConkey, and prayed that Sutherland might be ordered to redeem the plaintiff what he should have to pay McConkey.

The defendant McConkey answered, and after answer the plaintiff obtained the common order to amend, and thereunder has made in some respects an entirely new case. By the amended bill he sets up a partial failure of the consideration for the mortgage to McConkey, and he alleges that he was induced by the defendants McConkey and Sutherland improvidently to consent to McConkey's conveying the land in question to the plaintiff's son and to the latter's mortgaging the same to Sutherland to secure a debt due to him by the son, and he alleges that the consideration for his doing so was the agreement that a lease should be made to him and his wife, and the survivor of them for life, of five acres of the land in question, which was to include the buildings on the land, and be free from McConkey's mortgage, and it is alleged that this transaction took place under such circumstances as to render the conveyance by McConkey to the plaintiff's son and the mortgage by the latter to Sutherland void as against the plaintiff, and it further alleges that by mistake the five acres included in the lease to the plaintiff and his wife do not comprise the buildings, and while still praying to be let in to redeem McConkey the plaintiff now seeks to set aside the deed from McConkey to the plaintiff's son, and the mortgage from the latter to the defendant Sutherland, or that the lease to the plaintiff and his wife may be reformed so as to include the buildings, and that the defendant Sutherland may be ordered to redeem the five acres from the McConkey mortgage.

On the part of the defendants McConkey and Sutherland it is now contended that so extensive a change in the frame of a suit cannot properly be made under the common order to amend, and they ask that the amended bill (a new engrossment having been filed) may be ordered to be taken off the files, with costs.

I do not think the defendants are entitled to such an order. I stated on the argument of the motion that I thought that the question raised

on this application must be resolved into a simple question of *costs*, and an examination of the cases has confirmed me in that opinion. The only case in which I find that such an application was granted is that of *Bullock v. Perkins*, 1 Dick. 110. There the cause having come to a hearing, it was ordered to stand over, with liberty to the plaintiff to amend by adding parties. The plaintiff amended by striking out certain allegations, and an application to take the amended bill off the files on the ground of the alteration thereby affected in the frame of the suit, was granted. But even there Lord Eldon expressly based his judgment on the ground that "the plaintiff by striking out charges from his bill makes himself his own judge, and by preventing that matter's coming before the Court from which it is evident he could expect no relief, prevents the Court from doing that justice to the defendant it otherwise would by giving him the costs occasioned by the charges which are thus struck out."

In several other later cases, however, similar applications were refused, although the change in the plaintiff's case was just as extensive as in the present case, and the amendments have been allowed to stand. But the defendant was held entitled to recover all costs occasioned to him beyond what he would have incurred if the bill had been originally filed in the form to which it had been altered by the amendments : see *Dent v. Wardell*, 1 Dick. 339; *Smith v. Smith*, G. Coop. 141; *Mavor v. Dry*, 2 Sim. & S. 116; *Mounsey v. Burnham*, 1 Ha. 22; *Potter v. Walker*, 2 DeG. & Sm. 410, 418; *Allen v. Spring*, 22 Beav. 615.

In *Maunsey v. Burnham* it was held that a special application should be made by the defendant to be allowed such costs, and that it should be made immediately after the commission of the injury complained of ; and that it was an inconvenient practice to postpone such an application to the hearing of the cause, and the reasons assigned for that rule appear to me very forcible : *Parker v. Nickson*, 4 Giff. 311; 11 W. R. 635. In *Allen v. Spring* and *Finch v. Westrope*, L. R. 12 Eq. 24, however, the question was entertained at the hearing, and in the latter case the Court declined to compel the defendant to make a special application for the purpose of getting allowed these costs. According to the English authorities, therefore, it seems open to a defendant either to make special application, or leave the question open for discussion at the hearing. The former appears to me the most conve-

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nient, for the reasons stated in *Mounsey v. Burnham*.

I think there can be no doubt that in the present case the plaintiff has materially changed the nature and object of his suit; and I think the defendants McConkey and Sutherland are entitled to all costs occasioned to them beyond what they would have incurred had the bill been originally filed as it now stands, including the costs of the application, and that is the order I make.

It was urged that the defendant McConkey has improperly joined in this application, on the ground that the amendments objected to, do not materially alter the nature of the relief originally claimed against him, but the amended bill contains allegations affecting Mr. McConkey's conduct in the transactions which are impeached, which were not in the original bill, and in respect of these allegations, although no relief is prayed against Mr. McConkey, he might very properly refuse to permit the amended bill to pass unanswered.

Even if he were improperly joined, however, the cases seem to shew that that would be no bar to his co-defendant Sutherland succeeding on this application: *Gilbert v. Jarvis*, 16 Gr. 29; *Collins v. Denison*, 2 Chy. Ch. 465.

The defendants appealed from this decision on the 31st March, 1873, when judgment was reserved.

On the 1st April,

BLAKE, V. C.—It is quite certain that an amendment will not be allowed which will convert the amended bill into one for a different object from the original bill; but in this case I am precluded from saying whether the amendments were such as the plaintiff was justified in making, for the Referee has held that they were, and there is no appeal from his decision in this respect. The only question, therefore, is, whether his order was correct in ordering the plaintiff to pay the costs occasioned to the defendants by the alterations made in the frame of the bill as originally filed. Now if an amendment strikes out so much of the original bill as to render a great portion of the answer to it unnecessary, and a new answer is necessitated, it is but reasonable that the plaintiff should pay the costs of the defence which he has rendered useless; but I do not see the reasonableness of

charging him with costs when an addition to the bill is made without striking out any material part of it.

The more sensible course to pursue seems to be, that the plaintiff when filing his bill comparatively in the dark, should file a general statement of his case, await the answer, and then by amendment supplement the bill with more particular allegations. The order authorizes a full amendment of the bill, as a matter of right, and this is a far better course than for the plaintiff to make all sorts of charges of fraud, &c., in his bill at random, and then by amendment to withdraw them all again, after the defendant had been compelled to incur costs in answering them.

If such an application as the present were granted it would open the door to applications without end in Chambers for costs of amendment in all cases where the defendant has to answer new matter, or where his answer filed is rendered to a certain extent valueless by the striking out of portions of the bill. In most cases the costs of the application would far exceed the expense of the new answer required, or of the old answer rendered partially unnecessary.

I think, therefore, (1) that if a plaintiff amends his bill by striking out portions and altering it so that the answer put in is rendered useless, as a general rule the defendant should receive the costs of this portion of his defence rendered useless by the act of the plaintiff. But (2) if the amendments are not of so wide a scope as this, although so extensive as to contain new charges which may occasion another answer, I think that the plaintiff is not bound to have made such charges in his original bill, and the defendant, if eventually ordered to pay costs, should bear also such additional costs; and (3) when a party is entitled to costs it is not proper to make the application for them in Chambers. It is proper to make it at the hearing when the Judge has the whole case before him. In nine cases out of ten he can then better judge of the nature and propriety of the amendments, and in the tenth case he can refer it to the Master to ascertain this and to act upon this finding on the taxation.

These are the opinions I expressed at the close of the argument, and *Allen v. Spring*, 22 Beav. 615, which was not cited to me, is, I find, an authority which bears them out. The intention of the order under which this amendment is made is to enable the plaintiff to bring the

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whole case before the Court, and to do this it authorizes the most liberal amendment; and it is the duty of the Court to see that this is effected in the manner that will cause the least costs to the parties.

I need not here reserve the costs, as was done in *Allen v. Spring*, for I think that here they

never should have been awarded, and that the Referee, instead of allowing them, should have refused the application with costs.

Appeal allowed and application dismissed with costs.

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CHANCERY---MASTER'S OFFICE.

KEIM V. YEAGLEY.

Practice—Taxation—Revision of bills taxed by Local Masters—Powers of taxing officer at Toronto—Evidence.

The Taxing Officer on revision of bills of costs taxed by a Local Master has power under Gen. Orders 311 and 312 not only to strike out items improperly allowed but also to restore items improperly struck out and generally to review the taxation.

Evidence cannot be received by a Taxing Officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction.

[January 14th, 1873.—*Mr. Taylor.*]

This was an appeal from the decision of the Taxing Officer.

C. Moss for plaintiff.

W. Cassels for defendants.

Master TAYLOR.—It seems to me that the power of the Taxing Officer over bills of costs before him under Gen. Orders 311 and 312 is not limited to striking off items which he may find have been improperly allowed. In the Order of February, 1865, the reason for passing the order now in force as to the revision of taxation is said to be that the Judges have observed in bills of costs numerous items allowed by Local Masters which are not warranted by the tariff, and also that Order 312 directs the taxing officer to mark in the margin such sums, if any, as may appear to him to have been improperly allowed, or to be questionable, and this is relied on here as an argument that the taxing officer cannot restore any items taken off by the Local Master, but can only strike off items which he has improperly allowed. The order, however, goes further and says the taxing officer is to revise the taxation. Now the definition of the word *revise* as given in the Imperial Dictionary is, “To review, alter, and

amend,” so that the direction to revise the taxation is wide enough to cover what has been done by the taxing officer here. The provision for giving notice to the Toronto agent in all cases where the taxation is not clearly erroneous is one applying equally where the alteration intended to be made is by striking off or by restoring. The other question is, whether the Taxing Officer should have received evidence to show that the defendant is not entitled to the items in respect of which the contention has arisen.

The plaintiff desires to shew that the order changing the venue was obtained by the defendant for his own convenience and under an arrangement with the plaintiff that such order should be obtained at the defendants' own expense. Would such evidence have been admissible before the Local Master? I incline to think it would not.

The order is one obtained by the defendant on consent of the plaintiff and is silent as to the costs. This being the case under the third rule laid down in the *Memorandum of Rules* as to Costs, 1 S. & S. 357, the costs of both parties became costs in the cause, and the plaintiff having dismissed his own bill with costs, the defendant gets the costs of the cause and is entitled to the costs of the order.

The Master could not, it seems to me, receive any evidence to show that the defendant, is not entitled to costs which the order, considered according to the long established practice of the Court, gives him. Had it been intended that the defendant should not in any event have the costs, the order should have been so expressed.

The order is on the face of it a consent one, and this is another difficulty in the way of any change or variation being now made in it.

In connection with the first point disposed of namely the extent of the Taxing Officer's powers on a revision of taxation, it is worthy of observa-

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tion that at the time the orders of February, 1865, were passed, there was an order in force (28th April, 1862) under which any person against whom costs had been taxed by a Local Master could obtain an order of course for re-taxation in Toronto. This order has not been in force since the Consolidation of the General Orders in June, 1868. On a taxation under that order the whole bill was opened before the Taxing Officer. Orders 311 and 312 in fact require that every bill of costs taxed by a Local Master shall undergo that scrutiny by an officer of the Court in Toronto to which formerly only particular bills were subjected on the application of a party aggrieved.

Where a party feels aggrieved by the improper reduction of his bill of costs by a Local Master he has no redress except by the expensive proceeding of a special petition to the Court unless he can obtain as I think he can, redress under Order 312. To hold that he can do so when the bill is before the Taxing Master for review is, it seems to me, more consonant with the principles which govern as to proceedings in the Court, than to hold that he must resort to the expensive mode of proceeding by a special petition.

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ANSELL V. SMITH—RE CREDIT VALLEY R. W. CO.

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COMMON LAW CHAMBERS.

ANSELL V. SMITH.

Venue—Parties living out of the jurisdiction.

In moving to change the venue the fact that one party lives out of the jurisdiction does not affect the equities between the parties.

[January 14, 1873.—*Mr. Dalton.*]

This was an action brought by a Montreal against a Toronto merchant, in which the venue was laid in Stormont.

Foy, for defendants, moved to change the venue from Stormont to York, on the grounds that the cause of action arose in Toronto, that four of his witnesses lived there, and that it would cost \$85 more to try the case in Cornwall, also that in a cross-action in the Common Pleas which would require the same evidence, he intended to lay the venue in York.

Richards, Q. C., contra, read affidavits stating that the cause of action arose in Montreal, that ten of the plaintiff's witnesses reside in or near Montreal, that it would cost \$300 more to try the case in York, and that an application would be made in the cross-suit to change the venue to Stormont.

Foy, in reply, urged that as the plaintiff and his witnesses lived out of the Province the venue should be laid to suit the convenience of those living within the jurisdiction of the Court, viz., the defendant.

MR. DALTON thought, however, that the equities between the parties were the same as in a case where both parties were within the jurisdiction, and that the balance of convenience should govern. The summons was therefore discharged. Costs to be costs in the cause.

Summons discharged.

RE CREDIT VALLEY RAILWAY CO., AND COUNTY OF PEEL BONUS.

36 Vic. c. 36, sec. 14—*Ex parte application for enquiry—Particulars.*

Held, 1. An application under the above section must be by summons, and if an order be obtained in the first instance it will be set aside.

2. The enquiry must be confined to the particulars finally given by applicant.

[January 18, 1873.—*Galt, J.*]

Section 14 of the Ontario Act relating to Municipal Elections (36 Vic. c. 36) allows an application to be made to a Judge of the Superior Court, who on probable grounds being shown that any contravention of the statute by corrupt practices, &c., in procuring a by-law to be passed has taken place, may direct an enquiry before the County Judge, who, after taking the evidence, &c., is to report to a Judge of the Superior Courts for him to pass judgment as to quashing the by-law.

An *ex parte* application had been made to Mr. Justice Galt, under this section, for an order for an enquiry herein which had been granted.

Lash then moved to rescind the order on the ground that it should not have been granted *ex parte*.

Bethune shewed cause. The order is perfectly regular, being analogous to an application for a summons in the nature of a *quo warranto* under the Municipal Elections Act, and orders for writs of replevin or capias, &c. It must have been the intention of the Legislature that this order should have been obtained without notice, as they require that notice shall be given of the enquiry, thereby shewing that that they had the question of notice before them.

Lash in reply. There is a distinction between the applications for writs of replevin, &c., above

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RE CREDIT VALLEY R. W. Co.—FLEMING v. LIVINGSTONE.

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referred to, and the present one, viz.: that they were cases of individuals against individuals, whereas the effect of this order would be to let in the whole County to oppose the by-law unless the applicant were confined to the particulars given in the material on which the order was granted.

GALT, J.—(After consultation with the Chief Justice of the Common Pleas) thought that the proper construction of the clause was that the order should only be obtained upon summons; and that the applicant should be limited to his particulars, or should give particulars forthwith. The summons therefore was made absolute, rescinding the order on the ground that it could not be granted *ex parte*.

Summons absolute.

FLEMING v. LIVINGSTONE.

Jurisdiction—Prohibition—County Court—Set off.

Held, 1. That on an application for prohibition, &c., the Judge's notes at the trial should be accompanied by his report of the case.

2. The plaintiff in a County Court suit gave credit on a claim of \$300 (for board, &c.) for \$170, being the value of an article received by him from defendant. *Held*, that although the agreement as to setting off the one against the other be made before the debt for which the action is brought is contracted, yet, if the amount to be allowed to defendant for the article can be treated as a payment of a portion of plaintiff's claim, and not merely an unliquidated set off against it, or the transaction can be viewed as a sale first of the article upon an agreement that payment of it was to be made in board, &c., to be furnished by plaintiff to defendant—the Court has jurisdiction.

[January 24, 1873.—*Gwynne, J.*]

E. B. Wood moved absolute a summons for a writ of prohibition to the County Court of Brant, on the ground of want of jurisdiction. The claim is for \$300 for board, &c., which was reduced by the value of a coach to \$130 for which amount a verdict was given at the trial:

He read a copy of the Judge's notes in which nothing appeared as to any evidence having been given as to the value of the coach set off as payment on account of the claim, and cited *McMurtry v. Munro*, 14 U. C. Q. B. 166; *Furnival v. Saunders*, 26 U. C. Q. B. 119, and *Wallbridge v. Brown*, 18 U. C. Q. B. 158, to show that if the amount be reduced to \$200 by pay-

ment or by anything settled to be of a certain value, and agreed to be accepted as payment, it gives jurisdiction; that the finding of a jury is *prima facie* evidence as to the jurisdiction, but that the evidence must be taken as conclusive, and also that a plaintiff cannot compel a defendant to set off for the purpose of giving jurisdiction, i. e., he cannot give credit for an amount in order to bring his claim within the County Court jurisdiction, although this may be done in the Division Court under the Division Court Act. He also said that the value of the coach could not have been considered as part payment, or even looked upon as clearly ascertained, for the plaintiff did not give credit for anything in his particulars served, and only for \$100 in those annexed to the record.

Fitch shewed cause, and objected in the first place to the applications being granted on a copy of the Judge's notes, contending that the defendant should have put in direct affidavits as to the evidence and not relied simply on the absence of evidence as to the set off as shewn by the notes. He referred to the cases cited above and considered that under the circumstances the value of the coach should be considered as reducing the claim *by payment*, conceding that if it were only considered as a set off the Court would have no jurisdiction. He read a number of affidavits shewing that it was agreed that the coach (the value of which was stated at \$170) should be accepted by the plaintiff as payment, to which the County Court Judge if necessary would certify. He said the reason for his giving credit for the \$100 only was simply to bring it just within the jurisdiction, and so to compel the defendant to give evidence as to the whole amount himself. He also stated that the question of jurisdiction had been raised at the trial and had been determined in his favor.

Wood in reply considered that the Judge's notes were the proper material on which to found the application, and would be more reliable than affidavits as to the evidence, and submitted that this set off could not be considered as payment, as there was no existing debt at the time the alleged agreement was made.

Gwynne, J.—I could not grant this application without being satisfied that it is conclusively established that under no view of the facts had the County Court jurisdiction. If the amount to be allowed to the defendant for the coach sold by him to plaintiff could be treated as a payment of a portion of plaintiff's claim and

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not merely an unliquidated set off against it, or if the transaction could be viewed as a sale first of the coach upon an agreement that payment for it was to be made in board, &c., to be furnished by plaintiff to defendant, then there is no doubt the Court had jurisdiction.

Although the real facts of the transaction were not entered into upon the submission of the plaintiff's case in the first instance to the jury still upon the part of the plaintiff it was stated by his son that it was understood that the price of the coach was to be applied upon the board of defendant, and by another witness, who repaired the coach, that the defendant stated to him that he had made a deal with the plaintiff about it, and was to take it out in board—from this latter evidence it might reasonably be inferred that the transaction was a sale of the coach, payment of which was to be made by the plaintiff furnishing board to the defendant. The learned Judge was of opinion that there was evidence that the coach was not a set off, but that it was taken on the board account, and he refused therefore to withhold from submitting the case to the jury at the close of the plaintiff's case. The defendant then proceeded with the case and called witnesses, and among these witnesses, himself, and he swore that he sold to the plaintiff the coach at \$170, that he had it varnished and repaired, that he made an entry in his book of the sale of the coach, and the price of the board at the time. So that at the time he sold the coach an agreement was come to us to the price of the board. Naturally connected with this evidence, the date of the sale of the coach and of the commencement of the board would appear to the jury, and connecting defendant's own evidence with what the witness Lyons, who repaired the coach for defendant testified, namely that he heard the defendant say he was to take it out in board, a jury could have no difficulty in inferring from the defendant's own admission that he was to be paid for the coach by board. When therefore the plaintiff furnished board to the agreed value of the coach that transaction was concluded, the coach was paid for, and for such board the plaintiff in reality never had any claim whatever against the defendant. The jury seems to have taken, and very properly, this view. In effect therefore the plaintiff's claim was never in excess of the jurisdiction of the County Court. If I had not arrived at a clear conclusion upon this point I should certainly have felt bound to ask the Judge of the County Court for his report of what was submitted to the jury, for I think that the only proper mode of bringing up

his notes as a foundation for an application against his decision is as accompanying his own report of the case.

Summons discharged, with costs.

ABELL v. GLEN.

Covenant—Never indebted—Nullity or irregularity.

To an action in covenant the defendant pleaded never indebted: *Held*, not a nullity, but merely an irregularity.

Treating a pleading as a nullity does not prevent it afterwards being attacked as an irregularity.

[Jan. 8-28, 1873.—*Mr. Dalton—Galt, J.—Richards, C. J.—Gwynne, J.*]

To an action on covenant the defendant pleaded never indebted. The plaintiff, treating the plea as a nullity, signed interlocutory judgment, and gave notice of assessment of damages.

English then obtained a summons to set aside the judgment, and all subsequent proceedings, on the ground that at the time of signing the judgment there was a plea upon the files.

Ewart shewed cause. The plea filed is a nullity, and the plaintiff could sign judgment notwithstanding that it was upon the files of the Court: *Tidd's Practice*, 610; *Stafford v. Little, Barnes*, 257; *Perry v. Fisher*, 6 East, 549; *Ford v. Bernard*, 4 M. & P. 302; *King v. Myers*, 5 Dowl. 686. To actions upon covenant, only *non est factum*, and special pleas can be pleaded: *Reg. Gen.* 10 & 12. Although never indebted may be a sensible plea, still the rules of pleading must be adhered to: *Brennan v. Egan*, 4 *Taunt*. 164. Nothing can be tried upon such a plea as this: *Neal v. Proctor*, 2 Car. & Ker. 456; *Kelly v. Villebois*, 3 *Jur.* 1172.

English, contra, referred to *Archbold's Practice*, 392, and cases there cited.

On the 8th January,

MR. DALTON, after considering the matter, made an order setting aside the judgment, without costs to either party.

From this order *Ewart* appealed to *Mr. Justice GALT*, who refused a summons, stating that the matter lay in *Mr. Dalton's discretion*, and was not therefore a case for appeal.

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Ewart then applied to Chief Justice Richards, but his lordship, after considering the matter, refused to grant a summons to set aside the order.

Ewart then applied to Mr. Dalton for a summons to set aside the plea for irregularity, and because it was embarrassing and in contravention of the rules of pleading.

MR. DALTON declined granting the summons on the following grounds: (1) That having signed a judgment treating the defendant's plea as a nullity, which judgment was set aside in Chambers on the ground that the plea was a substantial defence, he cannot now ask to be allowed to sign judgment, nor to except to the plea as irregular; (2) That the lapse of time since the pleading concludes him.

Ewart, the next day, upon an affidavit setting out the above facts, obtained from Mr. Justice Gwynne a summons, by way of appeal, in the form in which he had applied for it to Mr. Dalton.

English shewed cause, citing the same cases as before.

Ewart, contra.

GWINNE, J.—The plaintiff has been attacking the plea from the day it was filed. I cannot see how he can be prejudiced in this application by the delay. The plea is bad and embarrassing, and I must make an order striking it out. The defendant to be at liberty to plead *non est factum*, and to apply in Chambers, within a week, to add such other pleas as he may be advised.

Costs, to be costs in the cause to the plaintiff.

Order accordingly.

NICHOLSON v. COULSON.

29-30 Vict. c. 42, s. 1—*Staying proceedings till costs of day in same suit paid—In forma pauperis—Abuse of process.*

Held, (1) That 29-30 Vict. c. 42, s. 1, does not refer to costs of day in *same* suit, and consequently proceedings cannot be stayed in a suit in which costs of day have not been paid.

(2) That nevertheless this can be done on the ground of abuse of the process of the Court, where the proceedings are vexatious.

[January 30, 1873.—*Mr. Dalton—Galt, J.*]

This case (crim. con.) was entered for trial at the Ottawa Assizes, but plaintiff withdrew his record. Defendant incurred costs of witnesses, &c., to the amount of \$296.88, for which amount he issued a rule and execution. This execution having been returned *nulla bona*,

J. B. Read, for the defendant, moved for an order staying proceedings till the costs of the day should be paid. He read affidavits swearing to a good defence, that the plaintiff was worthless, and that the action was brought vexatiously, for the purpose of annoying defendant and compelling him to spend money in his defence, the plaintiff having said he would ruin defendant by proceeding against him for the next ten years, &c. There had been, in fact, an abuse of the process of the Court. In analogy to suits *in forma pauperis*, his summons should be made absolute. He relied on 29-30 Vict. c. 42, s. 1.

Oster shewed cause. The summons depends entirely on the construction of the clause of the Act, the whole tenor of which shews that two actions were contemplated throughout. The section provides for two cases; one where the former cause is pending, and the other where the costs under an order, &c., in the former suit, have not been paid. As to the analogy to proceedings *in forma pauperis*, there is none, and at any rate a pauper would not be dispaupered for not paying the costs of the day. See *Waller v. Joy*, 16 M. & W. 60.

MR. DALTON.—I must take it, in the absence of express authority, that the Statute 29-30 Vict. c. 42, s. 1, has no application to this case. That clause only relates to the case of a "former suit," not to a rule or order made in the same suit in which the application for security is made.

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Then I take it also to be the practice that in a general way the payment of costs of the day cannot be made a condition precedent to the right to proceed. The authorities to this point are quite numerous, and are very clear. Chief Justice Draper suggests, in the case of *Becket et al. v. Durand*, 6 U. C. L. J. 15, "that an extreme case might arise where such a proceeding would be proper"; and he refers to *Henzell v. Hocking*, 9 Jurist, 181, where Patteson, J., states his opinion, that if a plaintiff wilfully keeps out of the way, and his attorney conceals his address to avoid a demand of payment of costs of the day, that proceedings might be stayed until such costs should be paid.

But it is not under the head of costs that the principles must be looked for upon which this case should be decided. The works of practice lay it down very broadly that the Court has an unlimited power over its own process, and will not allow it to be used for the purpose of injustice. I have referred to a great number of cases on the subject, and certainly they prove the general proposition, at least to this length, that the power is extensive and is undefined. Alderson, B., says, in one case: "The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior. Were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion, and where there are conflicting statements of facts, I agree that it is in general much better not to try the question on affidavits between the parties. The power must be used equitably, but if it be made out that the process of the Court is used against good faith, the Court ought to interfere to prevent it, for the purpose of administering justice :" *Cocker v. Tempest*, 7 M. & W. 502, 503.

Is this case within the principles so enunciated?

The affidavits shew that the action is for criminal conversation; that the venue was originally laid in Ottawa, where the case was first entered for trial. The defendant attended that trial at great and necessary expense for his counsel and witnesses; but the plaintiff did not bring the case on, and several facts are stated leading to the conclusion that the plaintiff had no intention of bringing it on. The defendant could never find that any witnesses for the plaintiff were in attendance, though the plaintiff had sworn to resist a change of venue; and

the defendant had thirteen necessary witnesses in attendance. Nor could he ever learn, though he repeatedly applied to be informed, whether it was the intention of the plaintiff to go on. So the defendant and witnesses were detained through the Assizes, till the plaintiff was obliged to withdraw the record. The defendant swears to his belief, that the action was brought only for the purpose of annoying him; that he has a good defence on the merits, and that the person alleged to be the wife of the plaintiff is really the defendant's own wife. The *f. fa.* for the costs of the day, which amount to some \$300, has been returned *nulla bona*, and it is sworn that the costs cannot be obtained from the plaintiff. Then by another affidavit an expression of the plaintiff is sworn to, that the defendant had married this woman and got a good deal of money with her, but that he would be a poor man yet before he got through, for the defendant would be at him for the next ten years. There is no answer to these affidavits.

I will only shortly say, that the case seems to be within the principles stated by Baron Alderson, and that indeed it would be a mockery of justice if the defendant could not have the relief which he seeks by this motion.

I shall therefore make the order to stay proceedings till payment of the costs of the day.

From this judgment the plaintiff appealed to Mr. Justice Galt, but he declined to grant a summons.

REGINA V. YEOMANS.

Setting aside conviction—Variance between it and warrant of commitment.

On a motion to set aside a conviction and warrant of commitment on the grounds: (1) That the conviction was not in the Magistrate's office, but in that of the Clerk of the Peace; (2) That the conviction did not contain a clause of distress; and (3) That the conviction only warranted the imprisonment without hard labour, whereas, the prisoner had been committed *with* hard labour.

Held, that the prisoner must be discharged, but on the last ground only.

[February 7, 1873.—Morrison, J.]

Conviction for being party to a compromise of a case of selling liquor without a license.

C. L. Cham.] REG. v. YEOMANS—REG. v. FIRMAN—HUNTER v. G. T. R. Co. [C. L. Cham.

Hurd moved, on the return of writs of *habeas corpus* and *certiorari*, to set aside the conviction and warrant herein, on the above grounds *inter alia*.

MORRISON, J., held that as to the first objection, the Clerk of the Peace was the clerk of all magistrates. As to the absence of the clause of distress, he did not think its insertion in the conviction absolutely necessary, although, as disagreeing with the warrant, it might, in that respect, be a good objection, observing that the magistrate should have first issued a warrant of distress to recover the penalty, and on its return *nulla bona*, should have issued the warrant of commitment. He, however, considered the last objection good, and discharged the prisoner.

Prisoner discharged.

REGINA v. FIRMAN.

32-33 Vict. c. 31, s. 71, C.—*Appeal from Quarter Sessions.*

The above Statute, preventing applications touching the decision of a Judge at Quarter Sessions, in appeal, not only refers to cases where an adjudication has taken place therein, but even to where the appeal has gone off on a preliminary objection to the right of entering it.

[February 10, 1873.—*Galt, J.*]

Hurd moved for a writ of *certiorari*, to remove into the Queen's Bench the order in appeal of the Quarter Sessions of the County of York, for the purpose of setting it aside, on the ground that it had never been tried, but had merely gone off on what he contended was a preliminary objection to the right of appeal.

The facts were that the prisoner had been convicted of selling liquor without license, and had appealed to the Court of Quarter Sessions, where an objection was taken on the part of the prosecution that although the prisoner had been licensed to sell liquor in certain quantities, he, having sold in large quantities, should be considered as unlicensed. The Chairman of the Sessions held this objection good, and made an adjudication in the following words: “Appeal dismissed—conviction confirmed.”

Hurd for the writ. The Act of 32-33 Vict. cap. 31, (C.) prevents such applications as these being entertained, after an appeal to the Quarter Sessions has been disposed of on its merits; but

there has been really no adjudication in appeal, it having been merely decided on the above objection to the right of trying it.

GALT, J., considered that in face of the ruling of the Chairman of the Sessions, as set out above, and the express wording of the clause of the Act, he could not grant the order.

HUNTER v. GRAND TRUNK R. W. Co.

Certiorari from Division Court—Variance between declaration and claim in Division Court.

A claim in a Division Court for \$40, for “detention of plaintiff by defendants, on a journey from Toronto to Detroit and back (journey occurring between 28th November, when he started from Toronto, and 3rd December, when he got back),” was removed by *certiorari* into the Queen's Bench, where declaration was on contract for \$500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar considering the want of technicality in Division Court pleadings.

[February 10, 1873.—*Mr. Dalton.*]

D. McMichael, Q. C., moved absolute a summons to set aside the declaration herein, on the ground that the case having been removed by *certiorari* from the Division Court, they should proceed on the same ground as they did there, whereas the declaration is on contract for delaying the plaintiff in his journey, in not starting the train at the time named, and the plaint in the Division Court is in tort, for “detention of plaintiff by defendant, on a journey from Toronto to Detroit and back (journey occurring between 28th November, when he started from Toronto, and the 3rd December, when he got back).” He contended that this was clearly in tort for breach of duty, after the start, and was such a substantial difference as to come within the cases. This is also shewn from the fact that the plaintiff, considering it to be for tort in the Division Court, confined his claim to \$40, whereas he now claims some \$500. He cited in support of this: *Gunn v. McHenry*, 1 Wilson's Rep. 277; *Mason v. Morgan*, 3 Prac. R. 325, and cases there referred to (also shewing that one cannot recover more than is claimed in the Court below); and *Legge v. Tucker*, 1 H. & N. 500.

English, contra. Considering the want of technicality in Division Court pleadings, these

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IN RE A. & B., TWO, &c.—WORTHINGTON V. BOULTON.

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claims are sufficiently similar, and plaintiff might have recovered in contract in the Court below, under the wording in the Division Court.

MR. DALTON discharged the summons. Costs to be costs in the cause to the plaintiff.

IN THE MATTER OF A. & B., TWO, ETC.

Attorney and Client—Taxation of Costs—Party liable to pay.

An assignee in insolvency employed a firm of attorneys to perform certain services in connection with the estate. Subsequently he resigned the position and gave these attorneys the moneys of the estate remaining in his hands, with instructions to pay their own costs first and then to hand the balance to the new assignee. This they did, and rendered their bill of costs.

Held, that the estate of the insolvent was within the meaning of Con. Stat. U. C. cap. 36, sec. 38, the "party liable to pay," though "not chargeable as a principal," and the second assignee was entitled to have the bill taxed.

[February 22, 1873.—*Mr. Dalton*]

It appeared from the affidavits filed that one Smith, the first assignee of the estate of one Hurst, had employed Messrs. A. & B. as his professional advisers in the insolvency proceedings, and that upon leaving Brantford to reside in Chatham he had paid over to them all the moneys remaining in his hands, with instructions to pay their own costs first, and hand the balance to the new assignee.

This was accordingly done, and a bill of costs rendered. The second assignee, Botham, now applied for a taxation of the bill so rendered to him, and John Patterson accordingly, obtained a summons, calling on the attorneys employed by the first assignee to shew cause why the bill of their costs in connection with the proceedings in insolvency, now delivered to the second assignee, should not be referred to the Deputy Clerk of the Crown at Brantford for taxation. He cited Insolvent Act of 1869, sec. 139.

Lash, for the attorneys, shewed cause:—This application cannot be made by the second assignee, between whom and these attorneys there is no privity of contract, and who could not be sued for the amount of this bill: *Re Barber* 14 M. & W. 720. The contract of the assignee with his solicitors is a personal not an official contract: he has a right to choose his own professional advisers, and is liable to them for the

costs of an unsuccessful action, instituted by his direction, even if it be one which has been prosecuted contrary to the wish of the creditors. Sections 50 and 51 of the Insolvent Act of 1869 place the assignee under the summary jurisdiction of the Court until he has fully accounted: *Re Botsford*, 22 C. P. 65. He, therefore, is the party who should be called upon by the summons, and he alone has a right to call upon his solicitors for a taxation of the bill which they have rendered him, and with which it is evident he was quite satisfied.

Mr. Luton (Paterson, Bain & Paterson) *contra*, urged that the second assignee is the official successor of the first, and as such is responsible, at least in matters of this kind, to the creditors for the acts of his predecessor, and is entitled to any rights which accrued to the first assignee by virtue of his official acts.

MR. DALTON.—It struck me during the argument that there is a strong analogy between the present application and the case of a mortgagor applying to have the conveyancing bill of the mortgagee's solicitor referred to taxation. There is no doubt as to his right to this (*Re Cavin*, 14 L. J. Chy. 100), although he could not have been sued upon the bill. I have also examined the cases of *Ex parte Coates*, 1 M. & A. 325, and *Ex parte Adams*, *Re Friedman*, 2 M. & A. 700, and I am satisfied that as the estate of the insolvent is clearly within the meaning of Con. Stat. U. C. cap. 35, sec. 38, the "party liable to pay," though "not chargeable as a principal party," viz., the assignee, as representing that estate, can have this bill referred to taxation.

Order for taxation.

WORTHINGTON V. BOULTON.

Amending writ of summons—Resealing—Endorsement—Interest.

A writ of summons may, after its issue and before service, be amended on principle by substituting a new plaintiff, without an order, and on such amendment there is no necessity for resealing, nor need it appear on the copy served that any amendment has been made.

If the writ is specially endorsed for interest the notice required by Common Law Procedure Act, sec. 15, may claim such interest without shewing the date from which it is to be calculated.

[Feb. 22—March 10, 1873.—*Mr. Dalton—Morrison, J.*]

This was an action originally commenced on the 3rd February, 1873, by one Robinson

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against the defendant, but on the 8th February the writ of summons which had not yet been served was amended on praecipe by substituting the name of the present plaintiff.

The action was brought to recover the amount due on a bond given by the defendant, with interest from January 1st, 1872, and the writ had endorsed upon it the usual notices under sections 14, 15 and 25 of the Common Law Procedure Act. The endorsement under sec. 14 being in the following form: "The plaintiff claims, \$5,600 and interest for debt, and \$25 for costs," etc.

On the 17th January, *Ewart*, for defendant, obtained a summons to set aside the writ, or the copy and service thereof, on the grounds (1) That it was improperly amended, by substituting one plaintiff for another, without an order for that purpose. (2) That the amended writ was not restamped and resealed, and not dated as of the date of the amendment. (3) That the copy served was not a true copy in this, that it did not show the amendment; and (4) that the endorsement did not clearly show the amount of interest claimed. He urged that there was nothing to show that the cause of action on the part of the old and new plaintiffs was the same, and that by this means the Statute of Limitations could be improperly avoided. He cited as to the resealing, *O'Reilly v. Vanevery*, 2 Pract. R. 184, and *Siggers v. Samson*, 2 Dowl. 745; and as to the absence of anything to shew the amount of interest claimed, *Chapman v. Becke*, 3 D. & L., 350.

Biggar shewed cause.

The praecipe will not be looked at for the purpose of affecting the writ with irregularity: *Lush* Pract. 383: *Usborne v. Pennell*, 10 Bing. 531; *Probert v. Rogers*, 3 Dowl. P. C. 170; *Wells v. Saffield*, 4 C. B. 750, *per Wilde*, C. J. Mansfield, C. J., says, in *Boys v. Durand*, 2 Taunt. 104, it is "a little worthless memorandum of no authority."

As to the first objection, no order is necessary for the amendment of a writ before service: *Watts v. Roderick*, (Common Law Chambers, 28th March, 1872): Chit. Arch. Pract. 12th ed. 212; *Gibson v. Varley*, 28 L. T. Rep. 158.

Resealing is unnecessary in Ontario (C. L. P. Act, sec. 6), and if it were, the restamping of the writ by the Clerk of the Process, upon amendment, is equivalent to the resealing required by the English Practice. Compare our C. L. P. Act, sec. 21, with sec. 11 of the English Act,

and see *Reg. v. St. Paul's Covent Garden*, 7 Q. B. 232; *Hamilton v. Dennis*, 12 Grant, 325. If a new seal is necessary, and the clerk has failed in his duty, the amendment will be allowed *nunc pro tunc*: *Nazer v. Warde*, 1 B. & S. 728, and the date will not be altered: *Gibson v. Varley*, 7 El. & El. 49; *Braithwaite v. Lord Montford*, 2 Cr. & M. 408; *Ashburton v. Sykes*, 1 D. & L. 153; *Combe v. Bristol and Exeter R. W. Co.*, 1 F. & F. 206. The third objection is too trivial to be answered: and as to the last, the statutory forms of endorsement have been closely followed, and the notice under Form No. 5 to sec. 15, sufficiently shews the date from which interest is to be reckoned: Chit. Arch Pract. 12th Ed. 193.

MR. DALTON.—As to the first objection, it is every day practice both here and in England to amend a writ of summons at any time before service without an order. Whenever so amended it was quite unnecessary to insert in the copy served the name of a plaintiff since struck out, so as to shew that an amendment had been made. The writ in its proper and final form should be copied and served. The endorsement objected to substantially follows the statutory form, and I must therefore hold it good. As to the resealing, this has been done so far as it is necessary here. Under the 36th section of the Con. Stat. U. C., cap. 10, writs are always sent to the country sealed and signed by the Clerk of the Process. Here in the County of York they are kept in large quantities sealed in blank. What is done in each of these cases in the issuing of a warrant? The clerk fills up the blank writ, affixes the stamps, impresses the date, and delivers it to the party. The writ takes effect not from its sealing but from its delivery. If an amendment is desired the clerk receives a second praecipe stating the nature of such amendment, makes the change required, affixes new stamp, and again impresses upon this the date of the amendment. There is no such thing as resealing, unless it be the redelivery—which would agree with what I have said as to the first delivery of the writ.

I think none of the objections tenable, and I must order that the summons, which rests wholly on technical grounds, be discharged with costs.

From this order the defendant appealed to a Judge on the second and fourth grounds taken in the original summons.

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The summons was re-argued by the same counsel on the 10th of March.

MORRISON, J., gave judgment dismissing the appeal with costs, on the ground that the re-stamping of the amended writ by the Process Clerk is under our practice equivalent to resealing in England, and that the special endorsement, read with the notice under sec. 14, sufficiently informed the defendant from what date interest was to be calculated.

Summons discharged.

JOHNSON v. LONEY.

Evidence—Certificate—Postal card.

A certificate of a Deputy Clerk of the Crown in the shape of a postal card is no evidence.

[March 5, 1873.—*Mr. Dalton.*]

J. H. Macdonald, on a motion to set aside a declaration, (on the ground that its date did not correspond with the date of filing) produced a certificate as to the date of filing, in the shape of a postal card received from the Deputy Clerk of the Crown.

Osler, contra, objected to this as evidence, and referred to Reg. Gen. 145.

MR. DALTON discharged the summons with costs.

GILES v. BENJAMIN.

Married woman—Prochein amy.

The disabilities of a married woman are not removed by recent legislation to such an extent as to enable her to act as *prochein amy*.

[March 11, 1873.—*Mr. Dalton.*]

Warmoll moved for an order for an infant to prosecute by *prochein amy* asking that the mother of the plaintiff, a married woman, should be appointed.

MR. DALTON, after taking time to consider, refused the application.

REAUME v. LEAVITT AND REAUME v. TROWBRIDGE.

Security for costs—Rescinding order—Property subsequently acquired.

The subsequent acquisition of property is no ground for rescinding an order for security for costs.

[March 13, 1873.—*Mr. Dalton.*]

W. S. Smith shewed cause to summonses in both these cases to rescind orders for security for costs (made in consequence of the absence of plaintiff from the country), on the ground that the plaintiff had subsequently acquired unencumbered property of sufficient value; and objected that the applications were unprecedented, also, that plaintiff's statement, as to the value of the property, should not be received. He cited *Limerick R. W. Co. v. Fraser*, 4 Bing. 394; *Edinburgh & Leith R. W. Co. v. Dawson*, 7 Dowl. 573; *Kilkenny R. W. Co. v. Fieldon*, 6 Ex. 81, and *Swinburn v. Carter*, 23 L. J. Q. B. 16.

Mr. Pepler (Harrison, Osler & Moss,) supported the summons. There is no direct precedent for the applications; but on the analogy of the practice laid down in *Place v. Campbell*, 6 Dowl., and other cases, of rescinding the order on the plaintiff's return to the country, the orders should be made. And here there would seem even to be a stronger case, as being something more definite and tangible than the mere person of the plaintiff.

Smith, contra. The plaintiff's return expressly displaces the right to security.

MR. DALTON.—These are applications to rescind orders for security of costs. The orders were rightly made in October last against the plaintiff, who resides out of the jurisdiction. But since the orders were made, (when, exactly, does not appear) the plaintiff has purchased two lots in Windsor, for which he paid some \$425 of our money, the lots being sworn to be of the value of about \$600, and he swears that he is the owner in fee simple, and that the land is quite free from encumbrances.

The possession of unencumbered real estate by the plaintiff, is, no doubt, an answer to an application for security of costs—if of sufficient value. It is true, also, that where an order for security has been made on the ground of the foreign residence of the plaintiff, that his afterwards becoming a permanent resident in Ontario, is a

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REAUVE V. LEAVITT, &c.—COUSINS V. BULLEN.

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ground for rescinding the order. No case in point is cited for the present application, but it is argued that as the possession of real property would have been an answer to the summons for security, the acquisition of it after the order has been made, ought to be a ground for rescinding the order, as much as the fact of the plaintiff becoming a permanent resident in Ontario would have been.

I do not see that there is the alleged analogy between the two cases. No matter how poor a man may be, and so, unable to answer a claim for costs in case of an adverse decision in his action, no security can be enforced from him merely on the ground of his poverty, where he is asserting his own interests in the action. If he be a foreign resident, security can be enforced; but, upon his becoming a resident in the jurisdiction, such an order may be rescinded, because the only ground for it has been displaced, and the *right itself* is, therefore, superseded.

On the other hand, the reason why the possession of real property is an answer to the claim is because it is taken to afford substantial security to the defendant. It is not that the plaintiff's owning such property is a reason why the defendant should *not have* security, but because it *is security* to him—and whenever, from any circumstances, it does not afford security, it ceases to be an answer at all. But if the acquisition of such property after the order made to the amount in value of the bond the plaintiff would have to give, or the amount he would have to pay into Court, is to be a reason for rescinding the order—then, this would practically follow, that instead of giving a security which would be under the control of the Court for the purposes of justice, the plaintiff might always keep the security in his own hands, and as he is as free to part with his land at any minute, as he was to acquire it, and the defendant has not the means of knowing the fact, the alleged security would be a mere delusion.

If it be alleged that owning the property before the applications would have been an answer for the plaintiff to the summons, I deny that it would be such answer, if it appeared that the investment had been made by the plaintiff to bring himself within the exception, or under any other circumstances which should excite the suspicion that the property was not really that which it was put forward as—viz., a substantial security to the defendant, which I have said is the only ground of the exception. See 6 Ex. 81.

Every thing may be quite fairly intended in this case, but the effect of making these summonses absolute would be to leave the security entirely under the control of the plaintiff, and if such a practice could prevail, we should probably seldom in future see security for the defendants' costs placed where it ought to be—under control of the Court.

I therefore discharge these summonses, costs to be cost to defendant on final taxations in any result.

Summons discharged.

COUSINS V. BULLEN.

Pleading—35 Vict. c. 12, sec. 4 O.—*Assignment of chose in action.*

Allegations in a declaration that a chose in action "was duly assigned in the manner required by the Act," sufficient under above Act, 35 Vict., cap. 12, sec. 4.

[March, 20, 1873.—*Mr. Dalton—Galt, J.*]

Declaration by the assignee of a chose in action alleging that it "was duly assigned in the manner required by the Act," (35 Vict. cap. 12.)

Demurrer that this allegation was not full enough, as the Act requires the particulars of the assignments to be given.

Osler, for plaintiff, moved to set aside the demurrer as frivolous.

O'Brien contra. It is not a sufficient compliance with the Act, which expressly directs particulars of the assignments to be given, and it does not even show whether the assignment was direct to the plaintiff or whether there were any intermediate assignments.

Osler in reply. *Prima facie* the allegation in the declaration means a direct assignment. See, as to pleading, *Hogan v. Aikman*, 30 U. C. Q. B. 14. The rule should be the same as in the case of bills and notes. Even if it were stated that the chose in action was assigned by the original holder to the plaintiff, the latter could still show any intermediate assignment.

MR. DALTON.—I think the declaration is sufficient, and I must set the demurrer aside.

From this judgment the defendant appealed to Mr. Justice Galt, but he agreed with Mr. Dalton, and refused a summons.

Order accordingly.

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COUSINS v. BULLEN.

Order giving leave to plead by a certain day, otherwise judgment.

An order gave a plaintiff leave to sign judgment as on default of plea, and gave defendants leave to plead by a certain day.

Held, that the plaintiff, after that day has elapsed, can sign judgment unless the plea is in by time limited by the order, even though it actually is on the files when judgment entered.

[April 2, 1873.—*Mr. Dalton—Hagarty, C. J.*]

An order was made in Chambers striking out a demurrer to a declaration as frivolous (*ante* p. 71.) “And that the plaintiff be permitted to sign judgment as on default of plea, with leave to the defendant to plead issuably on or before the 21st instant, &c.” The defendant did not plead until the 22nd. A few hours after the plea was filed the plaintiff signed judgment, treating the plea as a nullity. Whereupon, the defendant obtained a summons to set the judgment aside, as irregular, and on the merits.

Mr. Pepler (Harrison, Osler & Moss) shewed cause.

O’Brien, contra. The plea being on the files the judgment is irregular. The plea is certainly not void. At least the plaintiff should have moved to set it aside before signing judgment. See *Gray v. Pennell*, 1 Dowl. 120; 1 Ch. Arch. 260.

MR. DALTON.—The judgment was strictly regular. The plaintiff must have his costs of signing judgment and of opposing this application, if the judgment is set aside on the merits, and this is the only relief I can give.

From this judgment the defendant appealed to Chief Justice Hagarty, who, however, upheld the decision of Mr. Dalton.

Summons discharged.

PRACTICE COURT.

COOLIDGE v. BANK OF MONTREAL.

Payment of debt and costs after judgment—Reasonable time.

A party who has to pay debt and costs on a final judgment on verdict, nonsuit, demurrer or otherwise, in the ordinary course of a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them; nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting a "reasonable time" for payment.

[U]linary Term, 1873.—*Wilson, J.*]

Patterson, Q. C., obtained a rule last Michaelmas Term calling on the plaintiff and his attorney to shew cause, why they, or one of them, should not refund to the defendants, by paying to them or to their attorney the sum of \$23.28, paid to the sheriff of the County of Prince Edward, for the costs of the writ of *fi fa*, and the sheriff's fees thereon, on the ground that the writ was issued without giving the defendants a reasonable time to pay the amount of the judgment, after the revision of the taxation of costs, and was issued in bad faith, and contrary to the promise of the plaintiff's attorney, and why the plaintiff or his attorney should not pay the costs of this application.

The agent of the defendants at Picton made affidavit that on the 9th of July last he was informed by the gentleman who had the management in the office of the defendants' attorney, that an execution had been given to the sheriff in this cause against the defendants for \$337.18, which sum he gave to their attorney to pay the claim under the execution, but to protest against the payment of poundage and of the writ of execution: that no levy was ever made, nor did the sheriff or any of his officers inform the deponent of there being such an execution; nor did he or they ever demand payment of it; nor did the deponent ever know there was an execution excepting as aforesaid. The gentleman in charge of the office

of defendants' attorney stated in the affidavit that, on or about the 8th of June last, the costs were taxed in this cause before the deputy clerk of the Crown at Picton at \$129.05, and judgment signed for the plaintiff: that immediately after taxation he informed the plaintiff's attorney that he was instructed to have the costs revised at Toronto, and he caused all the papers to be transmitted to Toronto for that purpose: that he then asked plaintiff's attorney not to issue any execution, as defendants would pay the amount due as soon as the costs were finally ascertained, and the plaintiff's attorney promised that no execution would be issued: that on the 7th of July the sheriff informed the deponent that he had a *fieri facias* against the goods and chattels of the defendants in this cause to levy \$337.86, made up as follows:—

Damages	\$205 09
Costs	107 87
Interest	1 62
Writ	6 00
Sheriff's fees and poundage..	17 28

that of the last item \$16.03 was for poundage: that on the 10th of July he paid the sheriff the \$337.86, and he paid the \$16.03, and \$6 under protest: that he has demanded repayment from the sheriff of those two sums, but the sheriff has refused to repay them.

It was also shewn by affidavit that the costs were finally revised at Toronto on the 5th of July, and that the praecipe for a *fi fa*. was filed at Picton on the 8th of July. The plaintiff's attorney made an affidavit in answer, stating that he gave notice of taxation for 8th June: that the defendants' attorney did not attend, nor any one for him, and the deponent after waiting for half an hour went to the office of the defendants' attorney, and asked a clerk there if any one was going to attend to the taxation, and the clerk said the gentleman who managed the office was not in: that the deponent then returned to the deputy's office, and remained there about

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half an hour longer, and still no one attending from the office of the defendants' attorney, the deponent went a second time to the office of the defendants' attorney, and asked as before and got about the same answer; that deponent then went to the deputy's office and taxed costs, but did not enter judgment. Before entering judgment, he called at the defendants' agency and told the teller he had taxed the costs, but had not entered judgment, and that the bank had better pay this amount and save further costs, but the teller told the deponent that the defendants would perhaps take some steps in the suit for some alleged irregularity; that he then went to the office of the defendants' attorney and told the clerk there what he had done, and that the defendants had better pay the sum and save further costs; but that he got no definite answer, and he then went to the office and entered judgment; that no one spoke to the deponent about the judgment till on or about the 11th of June, when the defendants' attorney said the agent of defendants was dissatisfied with the costs and wanted to get them revised in Toronto; that he then proposed to go over the taxation again at Picton, but the answer was, that it was of no use, as the agent seemed determined to have the costs revised at Toronto; that defendants' attorney then asked the deponent not to issue execution until the costs were revised, to which the deponent agreed, but he never agreed to give the defendants any time whatever after the costs were revised, before issuing execution; that the costs were revised on the 5th of July; and on the morning of the 6th of that month, the deponent received a letter from his agents in Toronto, containing the draft bill of costs as revised; that he believed when he issued the execution, that the defendants' attorney had been informed by his agents of the final revision by the 6th of July; that execution was not issued till the middle of the day on the 8th of July; that the conduct of the defendants all tended to delay the payment of the money; that the execution was not issued in bad faith, but to compel payment, as it was believed the defendants would not pay the amount till compelled to do so, and that the defendants' attorney never promised to pay deponent the amount claimed as soon as the costs were finally ascertained.

Osler shewed cause.

It was not shewn when defendants' attorney first knew of the revision being completed. The plaintiff's attorney denies that he ever did or said more than that he promised not to issue

execution until after the costs were revised, and he did not so. It is said the defendants were entitled to a reasonable time after the revision was completed before the plaintiff could sue out an execution. If defendants were entitled to that, they had such reasonable time.

Patterson supported the rule.

The plaintiff's attorney admits all that the defendants need contend for in this case. He admits that he promised he would not issue execution until the costs were finally revised. They were revised on the 5th of July at Toronto. He knew of it on the 6th at Picton, and he issued execution at that place on the 8th. That time was too short a period to allow to the defendants to pay the amount taxed against them. He referred to *Perkins v. The National Assurance Association and Investment Association*, 2 H. & N. 71; *Cruikshank v. Moss*, 8 L. T. N. S. 439; *Henry v. Commercial Bank*, 17 U. C. Q. B. 104; C. L. P. Act, sec. 102; *Neale v. Winters*, 9 Grant, 261; *Cullen v. Cullen*, 2 Chy. Ch. 94; *Yates v. Freckleton*, 2 Doug. 622.

WILSON, J.—The only questions I have to consider are—1. Were the defendants entitled to a reasonable time after the final revision of the costs to pay the same before an execution could be sued out against them for the same? And if they were, then; 2. Had they such reasonable time allowed to them for the purpose?

In *Perkins v. The National Assurance and Investment Association*, 2 H. & N. 71, it was held that where costs were taxed under a Judge's order, which directed the payment of debt and costs, and payment was demanded immediately after taxation; and, not being paid, judgment was signed the same day, that the judgment was irregular. Pollock, C. B., said, "Without laying down any rule as to what would, under all circumstances, be a reasonable time, we are all of opinion that in this case the judgment was signed too soon. It is not reasonable to expect that an attorney's clerk who goes to the Master's office to superintend the taxation of costs, should bring with him a sum of money, however large the amount, to pay the debt and costs, for the plaintiff could not be bound to take a check. We decide nothing more in this case than that the judgment is irregular." During the argument, Martin, B., said, "A reasonable time ought to be allowed for the attorney to communicate with his client," and Bramwell, B., said, "The Master's office is not the proper place to pay and receive money."

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In *Cullen v. Cullen*, 2 Chy. Ch. 94, *Mowat*, V.C., on the authority of the cases in 2 H. & N. 71, 8 L. T. N. S. 439, and 17 U. C. Q. B. 104, before mentioned, set aside a *f. fa.* with costs, because sued out too soon after the taxation was completed. The taxation in that case was begun on the 27th; it stood over; on the 28th the plaintiff's solicitor concluded it without notice to the defendant's solicitor; and on that same day a *f. fa.* was sued out. After that, on the same day, the plaintiff's solicitor informed the defendant's solicitor the amount the costs had been taxed at, and before 2 o'clock of the same day the writ was delivered to the sheriff.

In *Cruikshank v. Moss*, 8 L. T. N. S. 439, the plaintiff made a Judge's order a rule of Court, taxed his costs, and forthwith on the same day issued execution. On the same day and before the execution had been levied, the defendant tendered to the plaintiff's attorney the amount of the allocatur, which was refused. A levy was then made, and the amount was paid under protest. An application was made to set aside the writ of *f. fa.* and all subsequent proceedings. *Willes*, J., set aside the *f. fa.* and the subsequent proceedings, on the ground that they were an abuse of the process of the Court; that the money paid to the sheriff should be returned; and that the plaintiff should pay the costs of the application.

Under the C. L. P. Act, sec. 102, when the defendant pays money into Court, the plaintiff may accept the same in full, and if he do he may tax his costs of suit, and in case of non-payment thereof within forty-eight hours he may sign judgment for his costs so taxed.

The cases of *Brierly v. Kendall*, 17 Q. B. 937; *Toms v. Wilson*, 4 B. & S. 455; and *Massey v. Sladen*, L. R. 4 Ex. 13, all shew that there must be a demand made for payment, and the party must wait a reasonable time after such demand before there can be a default under a bill of sale or chattel mortgage.

In the last case the money was to be paid, "instantly on demand, and without any delay on any pretence whatsoever," on a verbal or written notice to or for the debtor at his place of business. The verbal demand was made on the debtor's son, who said he could not pay. The chief Baron said, "A notice must be left on the premises under such circumstances that it must be presumed the plaintiff would give an answer to it in a reasonable time; were it otherwise the absurd and inequitable conse-

quence might follow that the plaintiff might have at his banker's moneys far exceeding the amount demanded, and yet might on his return from a five minutes' absence from his place of business, find that his opportunity of complying with the demand was lost, and that his goods were already in the hands of the defendants."

Without at present adverting to the strict rights of the parties, I may say that the practice has been ever since I have been connected with the profession, and ever since the commencement of the law itself in this Province, so far as I have heard and known it from gentlemen who were practising nearly sixty years ago, to sue out the execution immediately on the taxation of costs and the entry of judgment without notice or demand of any kind to or upon the opposite party or his attorney. It may be a harsh and unnecessary proceeding in many cases to do so. In other cases it may be an act of prudence and necessity to proceed without delay.

There are some cases in which a person has the right to take legal proceedings with apparent harshness against his debtor without notice or warning. As in the case of a promissory note payable on demand, the money is held to be due at once, and the bringing of this action is a sufficient demand: *Pierce v. Fothergill*, 2 Bing. N. C. 167, and the Statute of Limitations runs from the date of such a note: *Norton v. Ellam*, 2 M. & W. 461. Goods sold and delivered, or money lent, payable on request, require no request to be proved or laid: *Norton v. Ellam*, 2 M. & W. 461; *Victors v. Davies*, 12 M. & W. 758.

So on a bond for payment of money, no demand need be alleged; the obligation to pay arises upon the execution of the bond: *Gibbs v. Southam*, 5 B. & Ad. 911; and a bond payable on request, requires no request nor any averment of it before action brought: *Kepp v. Wiggett*, 6 C. B. 280.

If, therefore, in these cases an action can be begun against a person without any notice or demand, when it is only by supposition and fiction of law that the debt is due as soon as the note or bond is given, or as soon as the goods are sold or the money lent; and the costs of an action be put upon him before there is the possibility perhaps of avoiding it—what greater hardship is there in the creditor suing out an execution upon an adverse proceeding then actually in progress of which the other party has full notice at every stage. The hardship in the

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latter case is nothing like so great, as in the other cases which have been mentioned.

If an application were made for an attachment for non-payment of money on a demand made but a very short time before the application, the court would very likely discharge, or refuse the application, because that is a proceeding to some extent in the control and discretion of the Court; and the Court would see that no injustice was done to the other party.

The Court has, however, in protection of the sheriff, acting in good faith, set aside proceedings against him for the recovery of money made when the action was brought upon a return of *feeri facias* without any demand for it, and he had always been ready to pay it: *Jefferies v. Shepphard*, 3 B. & Al. 696. And perhaps proceedings on Judge's orders are, to some extent also, within the control of the Court: *Morris v. Barrett*, 7 C. B. N. S. 139.

It is said the party may, if he choose to waive his costs, enter judgment without notice of taxation, and issue his execution; and that it may be expedient to do so when the debt is large or to avoid the effect of a writ of error: *Somerville v. White*, 5 East 145, 146; *Doe dem Messiter v. Dynley*, 4 Taunt. 289.

In *Booth v. Parker*, 3 M. & W. 54, it was held that on a cognovit payable, debt, interest and costs, on a particular day (the debt being an ascertained sum) the plaintiff could not sign judgment till the costs were taxed, and till he gave the defendant notice of it. Nor could he sign judgment for the debt without the costs—without notice that the costs were given up, and informing the defendant of the amount of debt and interest, for until then there could be no default.

The mere omission to give notice of taxation, does not render the entry of judgment, or the issue of an execution irregular. The court will only order a revision of costs if there has been no notice, and if the other party were not present at it, and if there be any reduction of the costs, the party who taxed the costs, will be directed to pay the costs of taxation and of the application for it; and it is said if nothing be taxed off, there will be no costs on either side: Arch. Prac. 11th ed. 508; *Field v. Patridge*, 7 Ex. 689.

Our Rule 129 of T. T. 1856, provides, "that when a Judges order or order of Nisi Prius is made a rule of Court, it should be part of the

rule that the costs of making the order a rule of Court, shall be paid by the party against whom the order is made; provided an affidavit be made and filed that the order has been served on the opposite party, his attorney or agent, and disobeyed." It seems plain and reasonable to hold that before an order can be disobeyed, the party called upon to obey it, should have a reasonable time after a demand made upon him to perform it, to enable him to comply with it. Just as in *Booth v. Parker*, 3 M. & W. 54, where in the cognovit it was provided that no judgment should be entered unless default were made in payment of debt, interest, and costs by a named day, it was held there could be no default till the costs were taxed, and the defendant knew what they amounted to; and that the defendant should know that before judgment was entered. So in *Nicholl v. Brownley*, 2 B. & B. 464, where a warrant of attorney authorizes judgment to be signed if the party fail to pay on demand, there can be no default till after a demand, and failure to pay.

I perfectly understand that the party who has to pay costs on a final judgment on verdict, nonsuit, demurrer, or otherwise in the ordinary course of a cause, cannot know the precise amount he has to pay until taxation has been made and completed; but I cannot see that he is entitled to any time to pay the money, or that any demand need be made upon him for payment, before issuing an execution, although if the party offered to pay as soon as he went to his office or to the bank for the money, or if he offered his check at once, which the other from mere caprice and without just cause, refused to take, so that the money had to be gone for in lieu of the check, and if it appeared that the one entitled to payment, had no just or reasonable ground for refusing to wait so short a time; it is very likely that an execution sued out under such circumstances, would be set aside as an abuse of the process of the Court.

But to hold that in no case can a judgment be entered or execution sued out until a day, or any other time after the taxation of costs, and a demand made for payment, or, if both parties were present at the taxation, until a day or two after the taxation, might, in many cases, seriously prejudice the creditor's right or chance of recovery, by reason of other claims intervening before he would be in a position to act, or by affording the debtor an opportunity to make away with his property.

A verdict, and costs attendant upon it, are

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payable instanter, and the party is not prevented from recovering, as under a Judge's order, only if the allocatur has been disobeyed, nor as under the C. L. P. Act, sec. 102, only if the defendant have omitted to pay the costs taxed for forty-eight hours. It may be hard to proceed so summarily, but not more so than it is in many other cases before mentioned. It has always been the practice so to proceed, and I cannot say it is unjust, for after an adverse suit the failing party must know the proceedings to get the first of the contest will be pressed forward, and he should in such a case be prepared to meet the demand upon him, which is to be perfected by taxation.

If the defendants were in this case entitled to a reasonable time after taxation completed on the 5th July, to enable them to pay it, I think they had it, for execution was not issued till the eighth of July. They have not shewn that they did not know of the final taxation upon the 6th July at Picton, where they could have known of it as well as the plaintiff's attorney knew of it.

As regards the costs of the writ that must stand against the defendants, for the execution was rightly issued. And as respects the poundage, the defendants must arrange that with the sheriff, by an application against him if he should be held not to be entitled to it.

Rule discharged with costs.

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Notice of Trial—When necessary—Irrregular notice.

A notice of trial is necessary to be given in a cause to be tried, however that cause may go down for trial, whether as a remanet, or put off from one assize to another by Judge's order, or taken down to trial by rule of Court or Judge's order.

A notice of trial signed by one of two partners of a firm of attorneys, though not by the partner who was the attorney for the plaintiff on the record, is not a nullity, but merely an irregularity which can be taken advantage of, if it is calculated to mislead.

[Hilary Term, 1873.—*Wilson, J.*]

In Michaelmas Term last, *J. K. Kerr* obtained a rule calling on the plaintiff to shew cause why the verdict obtained at the then last assizes

should not be set aside, and a new trial granted, upon the ground that no proper notice of trial was given in the cause for the assizes, and on grounds disclosed on affidavits and papers filed.

The summons, which was in ejectment, was issued by and in the name of *A. B.*, an attorney, &c., and was indorsed with his name.

The notice of intention to produce certain documents in evidence, dated the 21st of March, 1872, was subscribed "A. B.", the name of another attorney "C. D.", but was struck out with a pen; then followed the words: "Attorney for plaintiff."

The notice of intention to examine the defendant of the same date was subscribed exactly in the same way and with the like correction. And so also was the notice of trial dated the 23rd of February, 1872.

The notice of trial, dated 30th September, 1872, for the assizes on the 21st of October, then following, was signed "C. D., plaintiff's attorney," and was served on the defendant's attorney on the 2nd of October. That notice of trial the defendants' attorney returned, and served a notice, dated the 14th of October, addressed to *A. B.*, plaintiff's attorney, and to *C. D.*, by whom the notice of trial was given, stating that if proceedings were taken on the notice of trial an application would be made to set them aside, "on the grounds that the said notice of trial was not served by the plaintiff, nor by his attorney who issued the writ of summons and carried on all prior proceedings herein; and that the plaintiff's attorney had not been changed by order or otherwise, and on the ground that no proper notice of trial had been given in the cause." This last notice was served on *A. B.* and *C. D.* on the 16th of October.

The defendants' attorney filed an affidavit in which, after stating the facts, he said, "The defendant has a good defence to this action on the merits, as I am advised and believe, and the defendant would have appeared on the said trial and have sought to establish such defence, had a proper or sufficient notice of trial been given in this action for said last assizes, or had the said defendant, or I, as his said attorney, not been advised that no proper or sufficient notice of trial had been given in this action for said last mentioned assizes."

A notice of the plaintiff's intention to examine the defendant, dated the 8th of October, 1872, was served on the 11th of that month on

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E. F., barrister at law (a brother of the defendant's attorney) and \$4 were then paid to him for the defendants witness's fees. That notice was signed "C. D., plaintiff's attorney." The affidavits and papers on the other side showed that A. B. and C. D. were in partnership during all the time in question, and carried on business at Kingston; and that the defendant's attorney resided in Cobourg, the land lying in the County of Northumberland: that the notice for examination of defendant had not been returned or objected to: that letters had been written on behalf of the plaintiff to the defendant's attorney, subscribed one by C. D. as representing the plaintiff, the others by A. B. & C. D.; and the defendant's attorney had written to the plaintiffs' attorneys in the name of A. B. & C. D. It was also shewn that after notice of trial had been given last spring, the defendant applied to put off the trial for the absence of a material witness, which was ordered by the Judge of Assize on payment of costs by the defendant.

J. A. Paterson, shewed cause.

The notice of trial, though signed in the name of C. D. as the plaintiff's attorney is sufficient; it was known by the defendant's attorney that C. D. was a partner of A. B. It was not, however, necessary that the notice should have been signed at all. A mere intimation of the time and place of trial, is all that is required. The very notice objected to is endorsed A. B. & C. D., which means that they were the plaintiff's attorneys. He cited *Scott v. Burnham*, 3 Chy. Ch. 399; *Gamble v. Rees*, 7 U. C. Q. B. 406; *Farley v. Hebbes*, 3 Dowl. 538; *Harrison's Dig.* 5579; *Brown v. Whitfall*, 8 Dowl. 592.

No notice of trial was in this case necessary at all, because the defendant after notice of trial had been given and the record entered for trial, had, on his own motion, got "the trial of the issues joined postponed until the ensuing fall assizes;" *Shepherd Butler*, 1 D. & R. 15; *Jackson v. Meyer*, 8 T. R. 345; *Gains v. Bilson*, 4 Bing. 414, 1 M. & P. 87; *Claudet v. Prince*, L. R. 2 Q. B. 406, 8 B. & S. 360; *Stockton, &c. Ry. Co. v. Fox*, 6 Exch. 127.

If a notice were necessary, the one given was, at most, irregular, and it should have been objected to in a reasonable time. It was served on the 2nd of October, it was not returned till the 16th, at a time when it was too late to correct it for the commission day on the 21st of that month: *Robson v. McGowan*, 2 Prac. R. 323. The affidavit of merits was insufficient.

J. K. Kerr, supported the rule. In *Gamble v. Rees, ante*, the defendant did not return the notice of trial, and his counsel appeared at the assizes and objected to the record. If the defendant had got ready for trial and incurred expense on such a notice, he could not have claimed the amount from the plaintiff. See Arch. Pr. 11th ed. 312: *Allan v. Boice*, 3 Prac. R. 200; *The Provident Society v. McPherson*, 3 Prac. R. 96; *Dignam v. Ibbotson*, 3 M. & W. 431; *Doe dem. Read v. Paterson*, 1 Prac. R. 45; *Young v. Laird*, 2 Prac. R. 16; *Williams v. Williams*, 2 Dowl. 350; *Fell v. Tyne*, 5 Dowl. 246.

WILSON, J.—It is said no particular form of notice of trial is necessary to make a good notice; and so long as it clearly and unequivocally informs the defendant that the plaintiff intends to proceed to trial at a certain time and place, it will suffice.

"Take notice of trial at the next assizes," was held a good notice because it was written on the back of the issue. It had no date, county, or attorney's name mentioned. If it had been on a separate paper, it would not have been good: *Henbury v. Rose*, Str. 1237.

So a notice of trial was held sufficient, though not addressed to the defendant's attorney, but when it was served on the agent of the attorney, he was told who the attorney was: *Senior v. McEwan*, 2 U. C. Q. B. 95.

In *Gamble v. Rees*, 7 U. C. Q. B. 406, the notice of trial served, was signed with the name of D. Boulton as plaintiff's attorney, while his partner, Mr. Cockburn, was the attorney on the record. The Court intimated that this notice was sufficient, but they held that as the defendant kept the notice, and gave no notice of the objection, and as the defendant's attorney appeared at the trial and took exceptions to the record, the objection came to late.

In *Dignam v. Ibbotson*, 3 M. & W. 431, it was said it was no waiver to keep a bad notice, it was merely matter of courtesy to return it. The attending at the assizes and excepting to the record was, however, an act of waiver in *Gamble v. Rees*. That is the only point which distinguishes that case from this.

In *Farley v. Hebbes*, 3 Dowl. 538, there was a partnership of attorneys of the name of Passmore & Taylor, and they appeared in their partnership name as was the usual course. Passmore's name was used as the attorney who

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pleaded in the cause. Their partnership was dissolved. The later proceedings were continued in Taylor's name as the defendant's attorney. Taylor without having had any order for a change of the attorney's name, got a rule for judgment as in case of a nonsuit. The plaintiff applied to set it aside because there had been no order authorizing Taylor's name to be used as attorney on the place of Passmore's. Williams, J., said, "Mr. Taylor was the attorney of the defendant in effect from the beginning to the end of the proceedings, he being in partnership with Mr. Passmore. There were first two attorneys acting in the suit up to a certain time; first one takes a step in the suit, and then another takes a step. I do not perceive that any uncertainty or inconvenience has been suggested as resulting from Mr. Taylor's name being substituted for that of Mr. Passmore's, without an order for that change. After the plaintiff's attorney attending on the summons (which had before been obtained by Mr. Taylor as the attorney), and thus recognizing the new attorney, I cannot allow the plaintiff to object to the omission of an order to change."

It is an irregularity only to appear by two attorneys : *Williams v. Williams*, 10 M. & W. 178.

I have no doubt the notice of trial in this case should have been in writing, and should have been signed by the name of the plaintiff's attorney : 1 Sellon's Prac. 409 ; Ch. Forms, 9th Ed., 134, and all the intermediate books of forms shew the same. The defendant's attorney did not recognize it. He did nothing to waive it and he returned it; he was not bound to do this, by some of the cases, but others say he should. He did not move to set it aside in Chambers, as he might have done, but he was not bound to do so : *Cotton v. Thompson*, 5 Jur. 270. The name of C. D. to the notice as the plaintiff's attorney, should not properly have been there. His partner's name was the name that should have been subscribed to it.

I do not attach much importance here to the notice being returned, because it was kept by defendant's attorney for fourteen days after service, and was returned only after it was too late to serve another in its place.

I hold the notice which was given not to have been a nullity, but to have been an irregularity of a nature not calculated to mislead and which did not mislead. It was well known to the defendant's attorney that A. B. and C. D. were

in partnership, and that this notice was given in this cause, and on behalf of the plaintiff, and at the instance of the two attorneys, for their partnership name was endorsed on the copy of notice which was served.

If the notice had been signed in the partnership name of the attorneys, I should not have thought it irregular. Nor if the plaintiff were conducting the suit in person should I have thought it irregular if the notice had the words at the end of it 'the plaintiff,' or 'from the plaintiff.' Nor do I think a notice would be irregular if it were subscribed 'the plaintiff's attorney,' without his name. It is somewhat irregular, being signed in the name of only one of the partnership, and that one not the attorney on record.

The notice of trial is a proceeding in the cause, but it is not any pleading or process to be filed of record. It is something which passes merely between the offices of the attorneys, in which precision must be observed; but not such absolute precision as in more formal proceedings in the cause.

I think a new notice of trial was necessary to be given, although the trial had been put off at the instance of the defendant in the spring before until the ensuing assizes. The sittings in London, England, have no counterpart here. In *Stockton Ry. Co. v. Fox*, 6 Ex. 127, Pollock, C. B., said, "There is this obvious distinction between the case of a cause being made a remanent on circuit and in term. Here the same Court sits, but each assize is held under a fresh commission." See also *Gains v. Bilson*, 4 Bing. 414.

In this country I think the rule is, and the practice has been that a notice of trial is necessary to be given in every cause to be tried, however that cause may go down for trial, whether as a remanent from a former assize, or put off by Judge's order, order of *nisi prius*, or taken down to trial by any order of a Judge, or by rule of Court.

The rule must be discharged, and I think it must be with costs.

Rule discharged with costs.

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Payment of costs—Reasonable time.

The plaintiff taxed costs on an order on 10th May. These costs were revised in Toronto on 22nd May, and on same afternoon were demanded of defendant's attorney in Toronto, the defendant himself living in Belleville. On 23rd May the order for costs was made a rule of Court.

Held, that the rule was regular.

[Hilary Term, 1873—*Wilson, J.*]

The record in this case was entered for trial at the spring assizes held at Belleville in 1872. An order was made by the presiding judge on the 28th of March 1872, that the defendants should be allowed to limit their defence, and that the defendants should pay to the plaintiff the costs of the cause; and that the plaintiff should be at liberty to withdraw his record; and that he should discontinue this suit. Costs to be paid immediately after taxation.

The costs were taxed at Belleville on the 10th of May, 1872, in favour of the plaintiff, and an allocatur given for \$346.62.

On the last mentioned day the plaintiff executed a power of attorney to a clerk of his attorney, to demand the costs for the defendant Jacob Cronk, of Belleville, and to acquit him for the same on payment. On the 22nd of May, the costs were revised at Toronto; and were reduced by the sum of \$21.10, leaving due to plaintiff \$325.52.

The clerk, who attended the revision for the attorney of Cronk, stated that he told Mr. Roaf, who attended for the plaintiff's attorney at the taxation, that the costs would be paid at once; that the defendant Cronk lived at Belleville, and the clerk would have to write to him, and tell him to pay them at once to Mr. McLellan the plaintiff's attorney, who also lived at Belleville; that he, the clerk, was sure he would do that, as Cronk was well able to pay them, and Cronk would do whatever they advised him, as he had always done; and that there would be no necessity for anything further to be done by the plaintiff to realize the costs. The clerk further said that he wrote to Cronk on returning to the office, to pay the \$325.52 at once to the plaintiff's attorney and save further costs. In the afternoon of the same day, he said he was served with a demand for the amount of the revised costs; which demand he did not disobey, but said the costs would be paid at once, and that they, the defendants attorneys, had no money belonging to Cronk; that Cronk had

been written to, to save time, and would pay the amount to the plaintiff's attorney direct. The letter did not reach Cronk till the 25th of May.

On 11th of June, the clerk received a letter from Cronk, enclosing one from the plaintiff's attorney, dated the 7th of June, in which Cronk was informed that the costs of making the order a rule of Court were taxed at \$20, and payment thereof was demanded. No one for defendant has been served with a copy of the rule, as he believed. The rule was issued after 12 o'clock on the 25th of May.

The money, \$325.50, was paid by Cronk to the plaintiff's attorney in Belleville, on the 25th of May, 1872, and a receipt was given to apply on costs in above suit.

This was the day Cronk received the letter of his attorneys, telling him the result of the revision, and to pay the amount at once to the plaintiff's attorney. The plaintiff's attorney saying the reason they did not give a receipt in full, was, that they did not know the exact amount of the costs as revised; and defendant did not know there was any other costs he had to pay till he got the letter of the plaintiff's attorney on the 7th of June.

The plaintiff's attorneys say that on the 25th of May the defendant called on them to pay the revised costs, but they declined to take the money, or to give a receipt in full, because they had not heard from their Toronto agents, saying to defendant that as the costs were revised several days before the agents might have made the order a rule of Court, and if so, the costs of it would have to be added to the other costs; but to call again at the office: that same day they got a telegram from their Toronto agents, saying, "Revised costs, \$325.52; costs of rule, \$20": that the costs were taken from defendant, and receipt given as aforesaid, so as not to cover the costs of the rule if the order had been made a rule of Court, and that defendant promised to call back again the same day and see if he had such further costs to pay, but he did not return, and they wrote to him on the 7th of June.

A clerk in the office of the Toronto agents of the defendant's attorneys in Belleville, made affidavit that he received instructions from the plaintiff's attorneys, as soon as the costs were revised, if they were not paid, to make the order a rule of Court with costs. On the 22nd of May, at the close of the revision, and in the presence of the clerk of the defendant's attorney, he spoke

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of making the order a rule of Court, and that gentleman did not ask it not to be done, but said he would try and get the costs paid at once : that a service was made on him the same day of the order and allocatur, and a demand made on him for payment, when he said it was all right.

The costs not being paid, he proceeded on 23rd of May, to make the order a rule of Court.

In Michaelmas Term, last, *J. A. Paterson* obtained a rule, calling on the plaintiff and his attorney, to shew cause why the rule making the Judge's order a rule of Court, should not be rescinded so far as it related to the costs of making such order a rule of Court on the ground that no reasonable time was given to the defendants to obey the order, and there was no disobedience of it ; and that they had notice to take the costs when paid in Belleville, and to pay them there, and not at Toronto, and why the plaintiff or his attorney should not pay the costs of this application.

English shewed cause.

Paterson supported the rule.

WILSON, J.—I have considered the matter at some length in the case of *Coolidge v. The Commercial Bank* (*ante p. 73*). This case depends upon the rule 129 of T. T. 1856, and the decisions upon it. By it a service and demand upon the *agent* in within the express terms of the rule. In the English rule, 6 M. & W. 602, The word *agent*, is not contained, yet in *Thompson v. Billing*, 11 M. & W. 361, a service and demand upon the agent were held to be sufficient. The agent being included in the term *attorney*.

In the case of *Re Robertson*, 5 Prac. R. 132, Mr. Justice Morrison thought when the demand was made on the agent, that sufficient time should be allowed to him to communicate with his principal, and to get the money before it could be said the order had been disobeyed.

In the case in 11 M. & W. 361, the Court of Exchequer were of opinion the agent should be furnished with money by his principal to pay the costs on demand, and then, the day after the demand in London, the order was made a rule of Court, and held regular.

In this case the costs were revised in the afternoon of the 22nd of May, the demand was made on the defendant's attorneys here in To-

ronto, not the agents, that same afternoon ; payment was not made, but a conversation took place between the two clerks who conducted the revision which is not sufficiently admitted or defined to be acted upon with safety. They do not agree in their accounts.

On that same afternoon the defendant's attorneys here advised their client at Belleville of the amount he was to pay, and directed him to pay it at once. He did not receive that letter till the morning of the 25th of May.

On the 23rd of May, the agents here of the plaintiff's attorney endorsed a motion on the order to make it a rule of Court, and the motion was made and filed the same day, but the rule was not issued till the afternoon of that day. On the 25th of May, the defendant in Belleville called at the office of the plaintiff's attorney before twelve o'clock, and tendered the revised costs, but they were not taken for the reasons before stated.

Last Term I was about to give judgment upon the assumption and inference that from the papers filed, the order was not made a rule of Court until the 25th, but Mr. English very candidly admitted against his own interest that I was mistaken in that respect as the rule was in fact complete on the 23rd of the month.

In consequence of that statement the matter has remained over till the present time that I might consider what effect that change of date should have (if any) upon the application.

The taxation was completed on the afternoon of the 22nd, at Toronto. That same afternoon service and demand were made by the agent of the plaintiff's attorney, upon the defendant's attorney in Toronto. The money was not paid, because the attorney had no funds of his client who resided in Belleville, where also the plaintiff and his attorneys resided, to pay the amount. And the next day the order was made a rule of Court. Was the non-payment on the afternoon of the 22nd a disobedience of the order at that time ?

The case of *Thompson v. Billing*, 11 M. & W. 361, is a decision that the town agent of the attorney should have been supplied with the means of paying the costs at once upon demand. Here the demand was on the defendant's attorney who resided in Toronto, so that there was more reason why he should have been supplied with money to pay the costs than there was that the agent should have been supplied with it in the case referred to.

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The case of *Re Robertson*, 5 Prac. R. 132, does not decide this point at all, although Mr. Justice Morrison expressed himself very strongly against so summary a proceeding as this is.

In *Cruickshank v. Moss*, 8 L. T. N. S. 439, an execution was issued the same day the costs were taxed on a Judge's order, and on that day and before the execution was levied, the defendant tendered the amount to the plaintiff's attorney who refused to receive it, and Mr. Justice Willes after taking time to consider, ordered the writ to be set aside on the ground that it was an abuse of the practice of the Court.

In *Cullen v. Cullen*, 2 Chy. Ch. 94, the execution was also issued the same day the taxation was closed, and the taxation was finished without notice to the defendant's solicitor, and it was set aside because it was issued at too early a period, Mowat, V. C., saying, "the defendant's solicitor was entitled to reasonable time to communicate with his client after the taxation was completed, and he became aware of the amount.

In *Pekins v. The National Association*, 29 L. T. R. 65, 2 H. & N. 71, costs were taxed on 25th, and demanded the same day, and on non-payment plaintiff signed judgment that day, and gave notice to tax costs of judgment the next day; the defendant's attorney attended, and when costs taxed he tendered a check, which was refused and execution was issued. A Judge set aside the judgment. On application to

rescind the order, Martin, B., said, "I think the defendant ought to have a reasonable time to get the money." Bramwell, B., said, "If no demand were necessary, it seems to follow a reasonable time must elapse." Pollock, C. B., said, "Do you mean to contend that if the debt is £1000 or more, the attorney's clerk is to attend with the amount in cash? Without deciding what is a reasonable time, we think it is unreasonable to expect the attorney's clerk to attend with the money in his hand."

In 2 H. & N. 71, Martin B. said, a reasonable time ought to be allowed for the attorney to communicate with his client; and that the Master's office was not the proper place to pay and receive money. See also *Henry v. The Commercial Bank*, 17 U. C. Q. B. 104.

In this case, different from all the others, the order was not made a rule of Court till the day after taxation and demand. I cannot say that was too soon. It was very perfect, but not exemplary practice. Under sec. 102, of the C. L. P. Act, if the plaintiff take the money paid into Court in satisfaction of his claim, he may tax his costs; and in case of non-payment for forty-eight hours, he may sign judgment for his costs. It would be well if such a rule was made in cases of this nature.

I must discharge the application, but I shall do so without costs.

Rule discharged.

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PAXTON v. DRYDEN.

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CHANCERY CHAMBERS.

REDMAN v. BROWNSCOMBE.

Irregularity—Endorsement on papers—Gen. Orders 40, 41

The endorsement of the name and place of business of the solicitor conducting proceedings, is by Con. Orders 40 and 41, required on the first writ sued out, or proceeding filed, in a suit or matter, but is not essential on the first papers served.

[April 2, 1873.—*The Referee.*]

An application was made by *Cattanach* for an order staying proceedings until security for costs was given. It was objected by *Hatton* that the name and place of business of the solicitor for the applicant were not endorsed on the notice of motion.

THE REFEREE over-ruled the objection. He considered that under Orders 40 and 41 such endorsement was only required on writs sued out or first papers filed in a suit.

SWEETNAM v. SWEETNAM.

Vesting Order—Expense of registry of mortgage for balance of purchase money.

A purchaser who, to secure a balance of purchase money, has given a mortgage to the Court, must pay the fees for registration of his mortgage.

[April 3, 1873—*The Referee.*]

W. R. Mulock moved for a vesting order for a purchaser.

G. A. Boomer, for the vendors, thought the purchaser should pay the fees for registry of the mortgage given by him to secure the balance of his purchase money.

THE REFEREE held that he should pay them.*

* See *Fahner v. Ran*, 1 Chy. Ch. 246; *Brady v. Walls*, 17 Gr. 699; *Kitchen v. Murray*, 16 U. C. C. P. 69.—REP.

PAXTON v. DRYDEN.

Motion to commit for disobedience of a direction of a Master—Evidence of default.

A party moving to commit for disobedience of any order or direction of a Master, must shew by means of a certificate of the Master, that the person moved against has disobeyed the order, and is in default.

It will be insufficient in Chambers to prove by any other means the service of the order, and that it has not been complied with, as the Master is the proper person to decide both these facts.

[April 8, 1873.—*The Referee.*]

A. Hoskin, moved to commit the defendants for not filing affidavits on production, in accordance with an order made by the Master.

C. E. English, for defendants Charles Paxton and Dryden.

W. G. P. Cassels, for defendant Thomas Paxton.

THE REFEREE.—This motion, I think, should be dismissed. A party moving to commit for disobedience to any order or direction of a Master, must be prepared to shew by the certificate of the Master, whose order or direction has been disobeyed, that the person moved against is in default. Here the Master certifies that he made an order for the production of documents, that the defendant Thomas Paxton has filed an affidavit, and that the other defendants have not filed any; nor has the defendant Thomas P. produced any documents. He does not state that the defendants have been duly served or notified of his order, nor does he say that the affidavit of Thomas Paxton is insufficient, or that he or the other defendants are in default. The plaintiff however produces the Master's order with an admission of service endorsed thereon, and he reads the affidavit of Thomas Paxton, and contends that on this motion it is open to him to shew by other means than the Master's certificate, that the order has been duly

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served, and that the affidavit filed is not a sufficient compliance with it. In this respect I think he has misapprehended the practice. All that I can look at as evidence of the alleged contempt, on this motion, is the Master's certificate, and that is insufficient.

The distinction between the proceedings to compel obedience to the ordinary orders to produce, issued by the Clerk of Records and Writs, and Deputy Registrars, and orders made by the Masters of the Court, would seem to arise from the fact that in the former case the Clerk of Records and Writs, and Deputy Registrars, act simply as ministerial officers of the Court; whereas the orders made by the Masters are made by them in a *quasi* judicial character. In the one case the Court takes upon itself to determine whether its order has been duly served and complied with, in the other case it leaves those questions to be settled by the officer making the order, and acts only upon his certificate: *Sutherland v. Rogers*, 2 Chy. Ch. 191; Bennett's M. O. p. 79, and App. 30, form No. 13; Daniel's Pr. by Perkins, 1st ed. 1360 *et seq.*

This objection is fatal to the plaintiff succeeding against any of the defendants.

As against the defendant Thomas Paxton, it may also be doubted whether a motion of this kind is not premature, it not appearing that the Master has ever issued a warrant to the defendant to bring in a better affidavit, which I think he should have been called upon to do, in order to give the defendant an opportunity of correcting the imperfection complained of in the affidavit already filed by him: *Merkley v. Casselman*, 1 Chy. Ch. 292.

Motion refused with costs.

REDMAN v. BROWNSCOMBE.

Married woman—Next friend—Security for costs—Staying proceedings—35 Vict. ch. 16, sec. 9—29-30 Vict. ch. 42, sec. 1.

A married woman brought a suit in her own name for redemption of lands, in which she claimed an estate for life under a lease made in 1866. *Held*, not her *separate* property so as to enable her to sue without a next friend under 35 Vict. ch. 16, sec. 9.

A former suit in respect of the same subject matter in which the bill had been dismissed with costs, to be paid by the next friend of the plaintiff, was considered as substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of such second suit.

A stay of proceedings until the costs of the former suit were paid, was refused, there being a distinction in this respect between suits by married women and suits by persons *sui juris*.

[April 12, 1873 — *The Referee*.]

Cattanach, for defendant, moved for an order taking the bill off the files for irregularity in being filed by a married woman without a next friend, or staying proceedings until security for costs should be given.

Winchester for the plaintiff.

THE REFEREE.—The plaintiff in this suit is a married woman, and has filed a bill in her own name for redemption of certain lands to which she claims title under a lease made on the 27th April, 1866, by William Tully to herself and her husband. The lease is made to both, but the habendum is to the wife for life, and in the event of her husband surviving her, then to him for life or until he marry again. Although the lease is to *both*, yet it seems the lessees will take according to the habendum: *Co. Lit.* 183, (b.) The plaintiff, therefore, is bringing her suit in respect of a freehold estate in lands; and the question is, whether she is entitled to prosecute the suit without naming a next friend. The plaintiff contends that under the provisions of 35 Vict. ch. 16, sec. 9, she is not bound to name a next friend. That section provides, "that a married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property *by this or any other Act*, declared to be her *separate* property; and shall have in her own name the same remedies, both civil and criminal against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other her *separate* property

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for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman." This section appears clearly to apply to suits brought by married women in respect of property, which by that or any other Act is declared to be their *separate* property. Section one of that Act, however, has been recently held to be *not retrospective*: *Dingman v. Austin*, 33 U. C. Q. B. 890, and see 9 C. L. J. 102; and there is no other Act that I am aware of which makes an estate such as the plaintiff claims in this suit, her *separate* property. The decisions of this Court upon the proper construction of the Con. Stat. U. C. ch. 73, I think have established that real estate affected by that Act, is not thereby constituted the wife's *separate* property: *Royal Canadian Bank v. Mitchell*, 14 Gr. 412; *Chamberlain v. McDonald*, *Ib.* 447. The present case, therefore, would seem not to be within the meaning of the 9th section, and a next friend should have been named. The order as to this branch of the case must be to the same effect as that made in *Hind v. Whitmore*, 2 K. & J. 458. (See *McPherson v. McCabe*, 1 Chy. Ch. 250, and also *Blackburn v. McKinlay*, 3 Chy Ch. 65, by which it appears that a bill is demurrable also on this ground.)

The defendant also claims to be entitled to security for costs under 29 & 30 Vict. ch. 42, sec. 1. By that section it is provided that, "In addition to any cases in which a defendant in any suit is now entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any suit or proceeding, in which it is made to appear satisfactorily to the Court in which such suit or proceeding has been instituted or taken, or to any Judge in Chambers, that the plaintiff has brought a former suit or proceeding for the same cause which is pending either in Upper Canada, or in any other country, or that he has judgment or rule or order passed against him in any such suit or proceeding with costs, and that such costs have not been paid, and such Court or Judge may thereupon make such rule or order staying such proceedings, until such security be given as to such Court or Judge shall seem meet."

In this case it satisfactorily appears that the plaintiff by her next friend, brought a former suit against this defendant for the same cause, and that her bill in such suit was dismissed with costs, which were ordered to be paid by her next friend to the defendant; and that such costs have not been paid. The plaintiff contends that

the Act does not apply, because the former suit is no longer *pending*; neither did the decree in that suit direct the plaintiff to pay the costs.

The case of *Elliott v. Pinkerton*, 4 Prac. R. 86, seems to be an authority against so literal an interpretation of the Statute. In that case the defendant was a Division Court bailiff, and it appeared that a former action had been brought against his sureties by the plaintiff for a false return, made by the defendant to an execution placed in his hands by the plaintiff, in which former action the plaintiff had been nonsuited; that whilst that action was pending and before judgment was entered, the plaintiff had commenced the action against *Pinkerton*, (who was not one of the defendants in the first suit) for the same cause of action. Whether the costs of such former suit had been paid or not, did not appear; and it was held in that case that the plaintiff was entitled to security. I think the present case is within the meaning of the Statute; and that the decree dismissing the plaintiff's bill and ordering her next friend to pay the costs, is substantially an order passed against her with costs;" and that the defendant is therefore entitled also to have the proceedings in this suit stayed, until security shall have been given for his costs of this suit.

The case of *Hind v. Whitmore*, appears to be an authority against this application so far as it seeks a stay of proceedings until the costs of the former suit shall have been paid: 5th ed., Danl. Prac. p. 697. It is somewhat difficult to see why a different rule in this respect should prevail with regard to married women, than that which prevails with regard to persons *sui juris* (see *Follis v. Todd*, 1 Chy. Ch. 283,) who abuse the process of the Court for the purpose of maintaining a vexatious litigation; the distinction, however, appears to be established. The reason for it may be founded on this consideration, that it is open to the defendant in any suit in which a married woman is plaintiff, to apply to stay the proceedings until a solvent next friend shall have been appointed, wherever there is any reasonable ground for disputing the solvency of the next friend named by her. On this part of the application, therefore, I make no order.

The costs of this application must be costs in the cause to the defendant.

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RE WESTERN ASSURANCE CO.

[Chy. Cham.]

RE WESTERN INSURANCE COMPANY.

Petitions—Practice as to—Irrregularity—Dismissing for want of prosecution.

It is unnecessary and irregular to file a petition before it is heard. The proper proceeding in order to bring it before the Court, is to serve a copy with a notice of a day for hearing endorsed.

This practice is applicable to petitions under the Insurance Companies Act, 31 Vict. ch. 48. But, as by this Act no special procedure is provided for making application under it to the Court, where proceedings were initiated by a *petition* which had been filed but not served upon the respondents, nor brought to a hearing, after a lapse of fourteen months the petition was treated as a bill, and ordered to be taken off the files for want of prosecution.

[April 18, 1873.—*The Referee*]

A petition was filed by the Provincial Insurance Company, on the 22nd February, 1872, under the provisions of 31 Vict. ch. 48, sec. 16, to obtain payment of a debt claimed to be due to the petitioners, from the respondents, out of the fund deposited by the respondents (the Western Insurance Company) with the Finance Minister. It appeared that notice of the filing of this petition had been given by the petitioners to the Finance Minister, and that in consequence of such notice the Finance Minister had refused to pay over the deposit to the respondents until the petition should have been disposed of. The petition had never been served, no notice of a time for hearing was endorsed upon it, and no proceedings had been taken by the petitioners since the filing of the petition to bring the same to a hearing. The respondents now moved to take the petition off the files or to dismiss the same for want of prosecution, or to limit a time within which the petitioners should be required to bring the same to a hearing.

Maclellan, Q. C., for the applicants. It was formerly improper to place a petition on the files until after a Judge had given his *fiat* for its hearing, and until it had been heard. Under the altered practice it was still improper to serve a petition without the proceedings which were substituted for the *fiat*, viz., an endorsement stating a time and place where the petition would be heard, and it should only be filed upon its being heard. The practice as to petitions under the Insurance Acts, should be governed by the ordinary rules respecting petitions, and the filing of the present one was therefore clearly irregular, and it should be removed for this reason, or at all events it should not be allowed to remain upon the files unacted upon, and a

continual obstacle to the distribution of the deposit in the hands of the Finance Minister.

Bain, contra. Papers are only taken off the files for containing scandalous matter. This petition was, perhaps, unnecessarily filed, but there is no jurisdiction for taking it off the files, though filed unnecessarily, as long as it is not improper, any more than for so treating exhibits to affidavits if filed. Until a petition is served, it is not before the Court, and the respondents cannot move to dismiss for want of prosecution. A bill may be dismissed before service, but this is by virtue of a special order: Gen. Order 93, *Somerville v. Kerr*, 2 Ch. Ch. 154. This petition can not be treated as a bill, as it has no style of cause, no plaintiffs or defendants.

THE REFEREE.—No particular course of proceeding is appointed by the Act of 31 Vic. ch. 48, for bringing the matter before the Court. It is admitted by the petitioners that if the ordinary practice of the Court, in reference to petitions, is to govern, that practice has not been followed in the present case. The petitioner's solicitor admitted that according to the usual practice of the Court, a petition is not filed until after it has been served on the respondent, and brought before the Court for hearing pursuant to the notice of hearing, which should be endorsed thereon, and he admitted that the petition in the present case had been *unnecessarily filed*. The admission that it has been unnecessarily filed, I think involves also the admission that it has been irregularly filed. It is clear to me that the petition has not been filed with a view of prosecuting it *bonâ fide*, otherwise it could and would have been served and brought to a hearing before this. It is equally clear to me that the respondents have been and still are injured by the filing of this petition, and that they are entitled to come to the Court to be relieved from the injurious consequences, which have resulted to them from the petitioners irregular proceeding.

The petitioners contend that there is no precedent for a motion of this kind, and it is very probable that they are correct, and that no case has arisen in which the irregularity complained of here, was ever committed before with the same injurious consequences. But though the wit of man may be ingenious in devising irregularities which have never before been committed or thought of, yet the Court has an inherent power in every case to prevent suitors from perverting its process into an instrument of

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RE WESTERN ASSURANCE CO.—RE GOODHUE.

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oppression, and to correct irregularities however singular they may be.

There can be no doubt that in presenting a petition to this Court under the Acts in question, the petitioners were bound to follow the usual course of practice applicable to petitions; but as I have said before, the Act does not point out any particular mode of proceeding, and it may be that it was open to the petitioners to file a bill. This petition is an initiatory proceeding, and the petitioners have chosen to file it, not according to the practice applicable to petitions, but as they would a bill of complaint; and unless this document be in the nature of a bill of complaint, the petitioners could have no right to place it on the files at all at the time they did.

In *Bennett v. Bennett*, 8 Gr. 446, the Court held that a bill of complaint might be treated as a *petition* under the Partition Act. So here this being an initiatory petition which could not properly be placed upon the files, at the time it was, as a petition, though it might, on the ground of its being a bill of complaint or in the nature of a bill, I think I may properly apply to it those rules which are laid down in the Con. Order in reference to the service of bills. If those rules are applicable, then it is plain from the case of *Sommerville v. Kerr*, that the petition should be ordered to be taken off the files with costs.

It is said that it is impossible to treat this petition as a bill, because it is not styled in any cause, no parties plaintiff or defendant are named, and it is styled and drawn up as a petition; but I do not think these are any reasons for saying it cannot be treated as a bill, although I confess they are strong reasons for treating it as a *very irregular* bill. I apprehend a suitor cannot, by filing an irregular proceeding, claim any greater privileges for it than he could if it had been strictly regular in form.

But whether it be treated as a bill or petition, I am satisfied it should be ordered to be taken off the files on the broad ground that the petitioners, by filing it as they did, and taking no steps whatever to prosecute the matter, and now (on this the second application to get rid of it,) offering no reasonable excuse at all for the gross delay of which they have been guilty, have made it clear that they have no *bona fide* intention of prosecuting the matter, and are endeavouring to make use of the files of the Court for an improper purpose.

I therefore order the petition to be forthwith taken off the files, and that the petitioners pay to the present applicants their costs of this application.

RE GOODHUE.

Appeal—Costs of reference under a decree subsequently reversed.

The Court of Error and Appeal reversed an order of the Court of Chancery and directed a petition to be dismissed with costs: *held*, that this did not entitle the appellants to costs of proceedings in the Court below, subsequent to the order which was reversed.

[May 6, 1873.—*The Referee.*]

In this matter the respondents presented a petition to this Court, praying that a decree might be pronounced for the purpose of carrying into effect the provisions of an Act of the Legislature of Ontario, respecting the estate of the late George J. Goodhue, 34 Vict. ch. 99: 19 Gr. p. 368-9. The Court pronounced an order in accordance with the prayer of the petition on the 3rd May, 1871, and thereby directed certain accounts and enquiries to be taken and made by the Master of this Court at London.

The petitioners proceeded to prosecute the reference under the order; but before the reference was concluded, the appellants appealed from the order of the 3rd May, 1871, to the Court of Error and Appeal, and that Court on the 9th of January, 1873, allowed the appeal, without costs.

C. Moss for the appellants now applied for an order for payment by the petitioners of the costs to which they had been put in the prosecution of the reference under the order of the 3rd of May, 1871.

Cattanach contra, for the respondents.

THE REFEREE.—It was objected on the part of the respondents on this motion that I have no jurisdiction to make any such order, and I think the objection is well founded.

By the 11th section of the Consol. Stat. U. C. ch. 13, it is provided “that the Court of Error and Appeal shall have power to dismiss an appeal or to give the judgment or decree, and to award

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the process or other proceedings which the Court whose decision is appealed against ought to have given, without regard to the party alleging error, and *and also award restitution and payment of costs.*" As to ordering restitution of costs paid under a decree subsequently reversed, see *Davidson v. Thirkell*, 1 Gr. 284; *Clark v. Smith*, 9 Cl. & F. 126, 144.

I think it is obvious from this section that the Court of Appeal has full power to award all such costs as they may think proper. In the present case they have reversed the order of this Court and directed the petition to be dismissed with costs, and the only question therefore, it seems to me, that I have to consider, is whether or not, such an order of the Court of Error and Appeal entitles the appellants to costs of proceedings subsequent to the granting of the order which has been reversed, and upon that point it appears to me the authorities are clearly against the present application.

In Daniel's Prac. 1374, it is said "where a decree is reversed by the House of Lords *with costs*, such costs are up to the hearing only, and will not include the costs of the prosecution of inquiries or issues directed by the decree appealed from"; (and see *Morgan & Davy*, p. 102.) In the case of *Siree v. Kirwan*, 9 Cl. & F. 716, Lord Cottenham, although being of opinion that the original decree appealed from was erroneous, nevertheless said "that as the appellant did not come to the House to reverse that decree, but permitted enquiries and other proceedings to be prosecuted without taking the proper steps to relieve himself from the decree, I think that he cannot now be relieved from his own costs of such enquiries and proceedings, though they necessarily fall to the ground." p. 746.

So also in the celebrated case of *Small v. Attwood*, 3 Y. & C. 501, the House of Lords having reversed the decree of the Court of Exchequer with costs, and remitted the cause to that Court to do thereon what might be just and consistent with the judgment of the House of Lords—it was held by the Exchequer that the order of the House of Lords gave costs only up to and including those of drawing up the decree of the Court of Exchequer and not the costs of the subsequent proceedings had under that decree.

In *McMahon v. Burchell*, 2 Phil. 139, Lord Cottenham said "where expenses have been incurred owing to a mistake of the Court no costs are given on either side, and therefore I do not

see how I can give any costs of the subsequent proceedings. It may be that the plaintiffs are losers by having succeeded in their appeal from the original decree, but I cannot on that ground break through the established practice of the Court." See also *Mayor of Southmolton v. Attorney-General*, 5 H. L. C. 39.

In *Gann v. Johnson*, L. R. 6 C. P. 461, the Court of Common Pleas having given judgment in favor of the defendants an appeal was had to the Exchequer Chamber, where the judgment of the Common Pleas was affirmed. The case was then carried to the House of Lords where an order was made reversing the judgment of the Exchequer Chamber and Common Pleas, and ordering judgment to be entered for the plaintiff, but no order was made as to the costs of the appeal to the Exchequer Chamber. On taxation the Master refusing to allow the plaintiff the costs of the appeal to the Exchequer Chamber, the plaintiff thereupon moved for a rule *nisi* to review the taxation, and claimed that the costs of the appeal to the Exchequer Chamber should be allowed to him, but this application was refused. Montagu Smith, J., in giving judgment said, "The right to the costs depends on statute, and the successful party must shew that he is entitled to them under the statute, either as the necessary consequences of the judgment, or by the award of some competent tribunal having discretionary power to give them. It does not appear to me that the plaintiff here has brought himself within either of these alternatives. The House of Lords which gave final judgment was not asked to award, or if asked, has not awarded these costs. * * * I think we have no power to award these costs; the House of Lords alone had power to do so, and they have not done so." These observations seem applicable to the present case.

The appellants, however, contend that the Court of Error and Appeal was not in a position to deal with these costs, inasmuch as these subsequent proceedings do not appear in the appeal book. I am inclined to think, however, that the Court of Error and Appeal would, upon a proper application, entertain the question of the costs of subsequent proceedings had under the order appealed from, and which are merely an incident or consequence of that order; but even if they would not, although that may be a reason for the appellants not having the express order of that Court for the payment of the costs in question, it is still incumbent on them to establish that they are entitled to recover them

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Re GOODHUE.—DOWNEY v. ROAF.

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"as a necessary consequence" of the judgment of the Court of Error and Appeal, and in that I think they have failed.

Although the appellants are not in my judgment entitled to recover the costs in question from the petitioners, it may be that on a proper application they may be entitled to recover them together with the costs of the appeal out of the estate : *Stokes v. Heron*, 12 Cl. & F. 202-3. But according to my view the Court of Error and Appeal is the only tribunal that has power to award such costs, or to direct by whom or out of what fund they should be paid.

The present motion must be refused with costs.

DOWNEY v. ROAF.

Costs to follow the event—Further directions.

The rule of the Court now is, that costs should follow the event, unless very special circumstances are shewn.

Evidence which may on a question of costs be used on further directions.

In an order made on appeal from a Master's report the grounds of appeal should be recited.

[April 5, May 6, 1873.—*Blake, V. C.—In Court.*]

This was a suit respecting partnership accounts brought by one partner against the personal representatives of another. It was heard on further directions on the 2nd April; judgment on the question of costs was then reserved and was delivered by

BLAKE, V. C.—[After referring to the cases of *Millington v. Fox*, 3 M. & Cr. 350; *Earl Nelson v. Lord Bridford*, 10 Beav. 306; *Bartlett v. Wood*, 9 W. R. 817; and *O'Loane v. O'Loane*, 2 Gr. 130.] Following these cases I must hold that though the disposition of the costs is in the discretion of the Court it will exercise its discretion by directing the costs to follow the result, unless very special circumstances appear in the case. The general rule laid down in partnership cases (see *Lindley on Partnership* 196; and *Morgan & Davy on Costs* 175,) is, that costs should be awarded to neither party up to the hearing, and subsequent costs be borne by the estate, if any; or, if none, by contribution. This rule, also applicable to cases of construction of will, was based upon the principle that there having been a general benefit to all parties by the orders and

investigation of the Court, it is reasonable that all should bear the costs even though the plaintiff may fail in his contention. In the present instance I find no such special circumstances, no intricate accounts have been solved, and the case is simply that of a claim of one person against another. The defendants, therefore, having failed must pay the costs.

There is another question arising out of the motion, though not in any way influencing my decision, to which I think it is desirable to advert, in order to make parties more clearly aware of their position at a hearing on further directions.

It was urged here by the counsel for the plaintiff that the Court was bound to refer to an order made on appeal from the Master's report, in order to become informed as to the points taken in the Master's Office, and as to which of them were appealed from. I think this contention is right. Before the case of *Gould v. Burritt*, 11 Gr. 234, was decided, although nothing could be looked at on further directions except the Master's report, still, on a question of costs the pleadings and all proceedings in the Master's Office might be referred to. In that case it was only decided that the evidence taken in the Master's Office could not be looked at. I am of course bound by this decision, but I do not feel disposed to extend it to any other circumstances than it in terms involves; I therefore consider that the pleadings and all orders may be referred to, the evidence being alone excepted.

In this case the Vice-Chancellor had referred to the order made on appeal from the Master's Report, but the grounds of appeal were not recited in it.

MacLennan, Q. C., said that there was an impression that it was improper to recite them.

BLAKE, V. C.—I think it should always be done. In the case of *Patton v. Stevenson*, 5th Sept., 1872,) which may have given rise to this impression, the order had read that the Master was wrong in ruling in one way, and declared that he should have ruled in another. The only result which could be deduced from the language of the Bench in that case was, that the order was improperly drawn in declaring that the Master should have ruled in the other way mentioned.

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TRUST AND LOAN COMPANY V. START.

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TRUST AND LOAN COMPANY V. START.

Delivery of possession—Con. Orders 389 & 464.

After sale under a decree, an order for delivery of possession, will not, as a general rule, be made against a person not a party to the suit : and, *quare*, if there be any jurisdiction over strangers except in the plain case of parties taking possession, *pendente lite*, without any pretence of paramount title.

[May 21, 1873.—*Referee.*]

The plaintiffs in this case, having obtained a decree for the sale of certain mortgaged premises, which had been sold pursuant to decree, applied for an order to compel certain persons who were strangers to the suit to deliver up possession ; the application being made in the interest, and for the benefit, of the purchasers under the decree. One of these persons, McGuill, resisted the application as to part of the premises of which he was in possession, on the ground of his being entitled as lessee for an unexpired term under a lease executed by the mortgagor, prior to the mortgage. The other, Hotchkiss, also claimed to be in the possession of the part occupied by him as a tenant of the mortgagor, but whether his lease was before or after the mortgage did not appear ; neither did it appear whether or not his term was still subsisting. Both these parties claimed to be entitled to possession of all the lands in question on the present motion, as the purchasers thereof at the sale in this cause ; and they contended that the person to whom the lands had been knocked down at the sale, and who by the Master's report had been declared the purchaser, was in truth their agent ; and they stated that they had filed a bill to enforce their alleged rights in the premises.

R. M. Fleming, for the plaintiffs the mortgagees contended that these leases were invalid as against the mortgagees.

D. Black, contra. The lessees' actual occupation of the premises at the date of the mortgage, was notice to the mortgagees of these leases which therefore are valid against them. No order for delivery of possession under Order 389, will be made against persons not parties to the suit : *Bank of Montreal v. Ketchum*, 1 Chy. Ch. 117 ; *Bank of Upper Canada v. Wallace*, 13 Gr. 184.

MR. HOLMESTED.—In *The Bank of Montreal v. Wallace*, Mowat, V. C., says, “Ordinarily an order for possession is only made against the parties to the suit. Indeed, I

have found no precedent for its being made against any one who was not a party except in favour of a Receiver, or to make available a sequestration ; and it has been expressly held that such an order can not be made in favour of a mortgagee in a foreclosure suit after final order. But if in a plain case, a party who takes possession *pendente lite*, without any pretence of paramount right, may be dealt with in this summary way in favour of a purchaser, under a decree for sale, the rule must, I think, be confined to such cases.” In that case, the application was against the administratrix of the mortgagor who was in possession and claiming to hold for an unexpired term, on the ground of an alleged understanding between the deceased and the mortgagees ; and the application was refused, the learned Vice Chancellor holding that on a motion for delivery of possession, he could not adjudicate upon the title of the administratrix, she being no party to the suit, and not submitting to the jurisdiction of the Court.

I think that case is an authority against the present application. It has been held that, under Order 464, an order cannot be made against a stranger to the suit in favour of a mortgagee who has obtained a final order of foreclosure—even though such stranger claim as tenant to the mortgagor under a lease, subsequent to the mortgage : *Bank of Montreal v. Ketchum*, 1 Chy. Ch. 117 ; or is even a mere trespasser : *Irving v. Munn*, 1 Chy. Ch. 240. See also *Scott v. Black*, 3 Chy. Ch. 323.

It is said, however, that Order 389, is wider in its terms, and that under that Order, strangers as well as persons who are parties to the suit may be summarily ordered to deliver up possession to a purchaser under the decree of the Court. The case of *Bank of Upper Canada v. Wallace*, however, was an application precisely similar to this and in that case from the learned Vice Chancellor's words which I have quoted, it is clear that he considered that no greater power could be exercised over strangers under Order 389, than under Order 464 ; and it is to be observed that he expressly says that he could find no precedent for an order being made against any one who was not a party to the suit, *except* in favour of a receiver, or in aid of a sequestration ; and his observations in reference to the Court having a summary jurisdiction over persons not parties to the record, are prefaced by the word “if,” and whilst refraining from asserting that any such jurisdiction actually exists, he contents himself with simply saying that *if* it do exist, it is con-

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fined "to plain cases where the party in possession has acquired possession, *pendente lite*, without any pretence of paramount right."

Under these circumstances, there being no authority cited in support of this application, I think, in the face of the cases I have referred to, I ought not to establish any such precedent in the present case.

The motion must, therefore, be refused, and with costs.

STRATFORD v. GREAT WESTERN RAILWAY Co.

Commission for examination of witnesses in Quebec—Con. Stat. Can., cap. 79, sec. 4.

Con. Stat. Can. cap. 79, sec. 4, which authorizes the issue of a subpoena to the Province of Quebec requiring the attendance of a witness for examination in this Province does not deprive a party of the right to have witnesses in Quebec examined by commission.

[May 21, 1873.—*Referee.*

D. Black, for the plaintiff, moved for an order for the issue of a commission to Montreal for the examination of a witness there.

W. R. Mulock, for defendants, contended that as by proceeding under Con. Stat. Can., cap. 79, sec. 4, a subpoena might be issued for the attendance of the witness at the hearing, no order should be made for a commission.

MR. HOLMESTED considered that this statute only gave a plaintiff an additional mode of procuring evidence, and granted the order asked.

CAMERON v. WOLFE ISLAND COMPANY.

Incumbrancers having neglected to prove claim let in after foreclosure, under special circumstances.

Incumbrancers, a company, duly notified in a creditor's suit to come in and prove their claim in the Master's office under the decree neglected to do so, relying upon a supposed remedy at law. They were accordingly foreclosed by the decree upon further directions, and subsequently an assignee of their claim, the legal remedy having proved illusory, applied to be allowed to prove the claim notwithstanding the foreclosure and the lapse of more than two years. The application was granted, as it appeared that no other rights had intervened, that no other incumbrances would be prejudiced, and that the only opposition to the motion was on the part of the debtor.

The application, under the circumstances, was held to be properly made in Chambers; but that if the claim had been adjudicated upon, on the merits, the motion should have been made in Court.

[May 30, 1873.—*Referee.*

This suit was originally instituted by a judgment creditor of the Wolfe Island Railway Company, to enforce payment of a claim by foreclosure or sale of the lands of the company. On the 19th November, 1855, a decree was pronounced whereby it was referred to the Master to take the usual accounts; and the Trust and Loan Company, as execution creditors of the Wolfe Island Railway Company, were added as parties in the Master's Office. They, however, declined to prove any claim, and on the cause coming on to be heard on further directions, on the 19th September, 1857, a decree was made foreclosing the Trust and Loan Company "of and from all right, title, and equity of redemption of, in, and to, the lands in the plaintiff's bill mentioned," and the decree went on to direct that the lands should be sold and the proceeds applied in payment of the creditors who had proved claims, and that the balance should be paid to the Wolfe Island Railway Company.

In 1871, this decree was reheard, and upon the rehearing a direction for the appointment of a Receiver was made in substitution of the direction for sale: (see 3 Chy. Ch. 54.) That part of the decree, however, foreclosing the Trust and Loan Company, remained still in force. After the decree the present applicant, the plaintiff by revivor, obtained an assignment of the claims of the original plaintiff, and also of the Provincial Insurance Company, the only creditors who proved any claim in the Master's Office, and also of the claim of the Trust and Loan Company, and she now applied to be let

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in to prove the latter claim, notwithstanding the foreclosure.

Walkem, for the plaintiff by revivor.

Kirkpatrick, for the defendants, the Railway Company.

MR. HOLMESTED.—When this motion was argued, I had some doubt whether the application should not have been made in Court; but upon further consideration I am of opinion that it may be properly made in Chambers. Had the claim been adjudicated upon on its merits, I do not think I should have had any jurisdiction, but as the foreclosure of the claim has been decreed simply on the ground of the default of the creditors in proving their claim, the case of *Kline v. Kline*, 3 Chy. Ch. 79, seems applicable. In *Sterling v. Campbell*, 1 Chy. Ch. 147, I find an application similar to this was entertained in Chambers. See also *Anon*, *Ib.* 292.

The only parties who now appear to be interested in the lands in question are the plaintiff and defendants the Railway Company. There were other defendants added in the Master's Office, who also neglected to prove their claims, and were foreclosed at the same time as the Trust and Loan Company. No one represents them, nor have they received any notice of this application, and I do think any notice to them was necessary. I have referred to the case of *Patch v. Ward*, 4 Giff. 96, which was cited, but do not think it has any bearing on the present application. Great delay has taken place in making this application, and it appears from the papers that in neglecting to prove their claims in the suit in due time the Trust and Loan Company deliberately rejected the benefit of the suit, and chose to rely on the legal remedy which they fancied they possessed for the recovery of their claim. This remedy has turned out illusory, and the applicant is now satisfied that the lands of the Company cannot be sold under an execution at law, and therefore, as assignee of the Trust and Loan Company, she seeks to come in and get the benefit of the decree on further directions. This excuse is not a satisfactory one for the long delay. The fact that there was an error in the decree on further directions as originally pronounced cannot be relied on by the plaintiff as an excuse for the Trust and Loan Company not proving their claim, because that error did not arise until after the Trust and Loan Company had refused to prove their claim in the Master's

Office, and, of course, the Trust and Loan Company had no right to assume that any decree but the right one would be pronounced.

If it could be shewn that any other rights had intervened, or that any other incumbrancer or party could be prejudiced by the granting of this application I think it should be refused: see *Cattell v. Simons*, 8 Beav. 243: *Hull v. Falconer*, 11 Jur. N. S. 151. When a party deliberately rejects the means which the Court offers for securing the proper realization and distribution of the funds of a debtor, and, on the contrary, chooses in preference to rely on his legal remedy to recover his debt, he has not a very strong claim on the indulgence of the Court, nor much right to expect that he will, after such a lapse of time as has taken place here, be allowed to retrace his steps and to claim the benefit of proceedings which he has already deliberately rejected.

In the present case, however, the only parties who resist the present application are the debtors the Railway Company, and I do not think that they can be so prejudiced as to make it necessary for me to refuse this application. The foreclosure of the claim of the Trust and Loan Company does not put an end to the legal liability of the defendants the Railway Company to pay the claim. It was said in argument that the rights of persons who may have become shareholders in the Railway Company since the decree of foreclosure was pronounced might be injuriously effected, but it was not shewn as a fact that any such persons exist, nor, if they do, in what way they could be prejudiced except that the assets of the Company would be employed in payment of this debt for which, as I said before, the Company remains legally liable under the circumstances. The application will therefore be granted on payment of costs, but in proving the claims of the Trust and Loan Company the dividends already paid, or payable, (if any) must not be disturbed: see *Sterling v. Campbell, supra*.

Application granted.

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KINCAID V. KINCAID—DICKEY V. ONTARIO PAVEMENT CO.

[Chy. Cham.]

KINCAID V. KINCAID.

Vendor and purchaser—Incumbrances—Effect of taking vesting order.

Payment of an incumbrance out of the purchase money in Court refused, the purchaser having accepted a vesting order.

[June 11, 1873.—*Referee*.—June 16—Strong, V. C.]

Motion by a purchaser for compensation in respect of taxes in arrear at the time of the sale. The conditions of sale stated that taxes would be paid by the vendor. The purchaser, relying upon this, took a vesting order without first seeing that the taxes were paid.

Arnoldi, for the purchaser. This is an incumbrance which should be paid by the vendor, or the purchaser should have a lien upon the purchase money to the amount of the taxes unpaid : *Stewart v. Hunter*, 2 Chy. Ch. 335; *Henderson v. Brown*, 18 Gr. 79.

Proctor, contra. The purchaser has waived his right by taking a vesting order instead of a conveyance with a covenant against incumbrances : *Miller v. Pridden*, 3 Jur. N. S. 78; *Thomas v. Powell*, 2 Cox. 394; Rawlc on Covenants for Title, 613, 614.

MR. HOLMESTED.—This application must be refused with costs. When it was mentioned on a former occasion I stated that I thought that the case was governed by the cases of *Miller v. Pridden*, 3 Jur. N. S. 78; and *Thomas v. Powell*, 2 Cox 394; and I see no reason to alter my opinion. Here there is no ground for saying there has been any fraud, misrepresentation, or concealment of any kind. The land was sold free from taxes. The purchaser, without requiring the taxes to be paid off, accepted the title, and took a vesting order; after the lapse of a year nearly he now applies to have the taxes paid off out of his purchase money remaining in Court. I think *Miller v. Pridden* clearly in point, and that the application is too late, and, as this is the second application, the applicant must pay the costs.

From this decision the purchaser appealed.

The appeal was argued by the same counsel.

STRONG, V. C.—Until conveyance or vesting order, it is the purchaser's right to have incum-

brances paid off. After that date his rights are governed by the letter of his contract, and to protect himself against payment of the incumbrance in this instance he should have armed himself with a covenant. By taking a vesting order simply, without covenants, he has waived his right.

Appeal dismissed with costs.

NOTE.—See *Bull v. Harper*, ante p. 36.—REF.

DICKEY V. ONTARIO WOOD PAVEMENT CO.

Misnomer of a corporation.

Defendants, a company, were styled in the bill “The Ontario Wood Pavement Co.” Certain other defendants alleged to be Directors of this Co., when brought up to be examined for discovery, denied all connection with it, and refused to answer any questions relating to “The Ontario Wood Pavement Co. of Toronto.” This latter name the plaintiff's solicitor stated to be the true corporate name of the Co. intended to be described by the bill; but there being no further evidence of this fact, an application to compel the defendants to answer the questions put to them was refused.

[June 17, 1873.—*Referee*.]

This suit was instituted against, among other defendants, a company which was styled in the bill “The Ontario Wood Pavement Co.” The plaintiffs acknowledged that they had misnamed the Corporation against which the suit was intended to be brought, and that the Company should have been called “The Ontario Wood Pavement Co. of Toronto.”

Certain other defendants were alleged to be directors of the Company mentioned in the bill, but having been brought up for examination for discovery, they denied having any connection with “The Ontario Wood Pavement Co.,” and, under the advice of Counsel, declined to answer any questions relating to the affairs of “The Ontario Wood Pavement Co. of Toronto,” as being irrelevant to the issue in this suit. The present motion was to compel them to attend again at their own expense and answer such questions.

W. G. P. Cassels for the plaintiff. These defendants having answered the bill referring to the Company under its style in the bill, have waived any right to object. The plaintiff is, at all events, entitled to have the questions answered, in order to find out what the name of the Corporation really is. He cited *Corp. of Co.*

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of *Bruce v. Cromar*, 22 U. C. Q. B. 321; and *Witham v. Salvin*, 16 Jur. 420.

C. Moss, for the defendants. The existence of the Company in the bill is not denied by the defendants, but they do not admit any of the other allegations; and they are justified in refusing to answer questions relating to any other Company. He cited Kerr on Discovery, pp. 14, 15, 16 & 160-2.

MR. HOLMESTED—It is to be observed that there is no evidence before me on the present application (except the statement of the plaintiff's solicitor) to shew that the Company, against which this suit is intended to be brought, is really the "Ontario Wood Pavement Co. of Toronto," and that the name given to the Company in the bill is in fact

mismomer. But, even if that fact had been clearly proved, I should still have had some difficulty in granting the present application, unless it had been also clearly established that the defendants had in nowise been misled by the mistake.

The facts proved here merely show that the plaintiffs, by their bill, have alleged the recovery of a judgment against the Ontario Wood Pavement Co., and claim certain relief against the defendants in respect thereof. On the examination they proceed to interrogate the defendants about the affairs of "The Ontario Wood Pavement Co. of Toronto," but, on the evidence before me, the plaintiffs seem to have been just as much entitled to have made enquiries into the affairs of The Ontario Wood Pavement Co. of London, Ottawa, Hamilton, or any other place they might choose to designate. In short, there is not a particle of evidence before me from which I can say that The Ontario Wood Pavement Co. mentioned in the plaintiff's bill must necessarily be the Ontario Wood Pavement Co. of Toronto.

The mismomer of a Corporation is a much more serious matter than the mismomer of an individual. The identity of the latter may be established without regard to his name, whereas, in the case of a corporation, the true corporate name is, generally speaking, essential to establish its identity; and the reason of this is obvious,—the one is a material, and the other an abstract body. There can be no doubt, I think, that if an individual be sued by a wrong name, and answer without correcting the mismomer, he could not, at this stage of the proceedings, avail himself of the mismomer to

invalidate the proceedings, or as a protection against answering any questions relevant to the case raised on the pleadings: *Churchill v. Churchill*, L. R. 1 P. & D. 485.

In a recent case in the Divorce Court an order for costs passed against a co-respondent in the cause, and an attachment was issued to enforce it, and the person who had actually been cited and served with the process and notices as the co-respondent, moved to set aside the attachment on the ground that his surname was misspelt and one of his Christian names omitted in the citation process and notices. But the Court held that it was too late then to take such an objection, and refused to set aside the attachment. But I do not see how that case can assist the plaintiffs here. Here, it is not the individuals moved against who have been misnamed, but a certain legal abstraction—the identity of which it is difficult to establish, except by means of its true name.

Although, as I have said before, the fact of mismomer has not been proved, I have no doubt of the correctness of the statement of the plaintiff's solicitor, and I have no doubt that "the Ontario Wood Pavement Co., of Toronto," about which he desired to examine these defendants, is the real name of the company against which the plaintiffs have the demand which they are seeking to enforce in this suit. At the same time, as the record stands, it appears to me there is a substantial mismomer which the plaintiffs should correct by amendment of their bill; and, until it is corrected, I do not think the defendants can be required to answer any questions relating to the Ontario Wood Pavement Co., of Toronto.

I regret that I am unable to grant this application. This is one of those cases in which it would seem that the real question at issue between the parties, is sought to be evaded by a mere technicality. The Court, in the interest of justice, is always desirous that cases should be decided on their merits, and that suits should not be delayed or defeated by merely technical objections. In the present case the technical objection is not raised distinctly by the answer of these defendants, as I think it should have been, and although I feel compelled to give effect to it, I do not think I should give the defendants any costs of this application.

The plaintiffs having once brought the defendants up for examination, may possibly meet with a difficulty in again examining them after

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the bill shall have been amended. The order that I make therefore is, that the plaintiff be at liberty to take such proceedings as they may be advised, to correct the alleged misnomer, and that upon such amendment being made, they shall be at liberty to proceed to examine the defendants in the cause, notwithstanding the examination already had.

There will be no costs to either party.

Application dismissed.

DUNN V. MCLEAN.

Affidavit.

A. B. and C. were partners, doing business in Chancery. A. B. and D. were partners doing business at Common Law. An affidavit tendered by C. on an application in Chancery was rejected, it having been sworn before D.

[June 19, 1873.—*Referee.*]

J. C. Hamilton, on a motion in Chambers, tendered an affidavit sworn as above stated.

W. R. Mulock objected to its reception, citing *Wood v. Harpur*, 3 Beav. 290.

MR. HOLMESTED refused to hear the affidavit read.

RE FOSTER.

Affidavits in reply—Cross-examination.

Cross-examination upon affidavits in reply permitted.

[June 23, 1873.—*Blake, V. C.*]

Upon a motion for an administration order.

H. Murray asked for an enlargement to cross-examine upon the affidavits filed in reply.

J. A. Boyd objected that the practice did not allow this.

BLAKE, V. C., in the absence of authority to the contrary, held that the cross-examination should be allowed as in the case of other affidavits, and more especially as affidavits in reply could not otherwise be answered.

RE MULLARKY, McANDREW, AND LAFLAMME.

Leave to rehear—Delay.

The rule that no rehearing will be allowed after the time limited, unless the delay is excused, is to be strictly followed.

Negotiations for a settlement were pending during all the time between the pronouncing of the decree and an application for leave to rehear, *held* no sufficient excuse for the loss of three rehearing terms.

[June 23, 1873—*Blake, V. C.*]

Motion on the part of the plaintiff for leave to rehear notwithstanding that more than six months had elapsed since decree.

Fitzgerald, Q. C., for the plaintiff.

Ewart, contra.

BLAKE, V. C.—The rule that no rehearing shall be allowed after the lapse of six months must be strictly followed, and time must count unless the delay is excused. No sufficient explanation is here given of the loss of three rehearing terms. Negotiations for a settlement were pending all the time; but the plaintiff should have protected himself by consent against the time running against him in the meanwhile.

Application refused with costs.

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Supplemental answers—Chambers.

Applications for leave to file a supplemental answer are properly made in Chambers before the Referee. (*Churton v. Frewen*, 13 L. T. N. S. 491, not followed.)

[June 25, 1873.—*Referee.*]

McWilliams, in a suit for alimony, moved for leave to file a supplemental answer setting up the defence of adultery.

A. Hoskins objected, that the motion should be made in Court: *Churton v. Frewen*, 13 L. T. N. S. 491.

MR. HOLMESTED following *Parent v. Murphy*, (Strong, V. C., 23rd April, 1872), held that the motion was properly made in Chambers.

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COTTON V. VANSITTART.

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COTTON V. VANSITTART.

Attachment of debts—Con. Stat. U. C., cap. 24, sec. 19—Solicitor's Lien.

A sum of money directed by a decree or order to be paid is a debt which is attachable under Con. Stat. U. C., c. 24, sec. 19.

Upon the application of a solicitor, having a lien in respect to a debt attached, the attaching order will be discharged as against him; but the party against whom such an order has been made is not entitled to its discharge on the ground of the existence of the lien in favour of his solicitor.

Where an application for the discharge of an attaching order was made nominally by a plaintiff, against whom the attaching order had been granted, but really by and for the benefit of his solicitor who had a lien on the debt attached, leave was given to amend the proceedings by making the solicitor the applicant, and the order was discharged, but without costs.

[June 26, 1873—*Referee.*]

On the 6th day of June, 1873, an interlocutory order was made in this cause, awarding \$28.48, costs to be paid by one J. P. Vansittart to the plaintiff. On the 20th June, Henry DeBlaquiere, a creditor of the plaintiff, obtained an order attaching all debts due by J. P. Vansittart to the plaintiff.

This was an application made by the plaintiff to discharge the attaching order.

Bain, for the application, cited Arch. Pr. 713; *Coppell v. Smith*, 4 T. R. 313; *Grant v. Harding*, 4 T. R. 312; *Eisdell v. Coningham*, 28 L. J. Ex. 213; *Williams v. Reeves*, 12 Ir. Chy.; *Lonn v. Church*, 4 Mad. 391; *Bozon v. Bolland*, 4 M. & Cr., 354; *Sympson v. Protheroe*, 26 L. J. Chy. 671, 5 W. R. 814; *Lucas v. Peacock*, 9 Beav. 177; *Verity v. Wild*, 4 Dr. 427.

C. Moss, for the attaching creditor, contra, cited *Shine v. Gough*, 2 B. & B. 33; *Taylor v. Popham*, 15 Ves. 72, 79.

MR. HOLMESTED.—The jurisdiction of the Court to make orders attaching debts rests upon the C. S. U. C., cap. 24, sec. 19. That section provides that "for the purpose of enforcing payment of any money or of any costs, charges, or expenses payable by any decree or order of the Court of Chancery. * * The person to receive payment shall be entitled to writs of *fit. fa. and ven. ex.*, respectively, against the property of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay, in the same manner respectively, and subject to

the same rules as nearly as may be, as in the case of a judgment at law in a civil action."

Having regard to the wording of this section, therefore, it is plain that a debt of a character which cannot be attached at law, cannot be attached by proceedings in equity: *Horsley v. Cox*, L. R. 4 Chy. 92; *Gilbert v. Jarvis*, 16 Gr. 265. As the jurisdiction of this Court in this respect is expressly limited by the words of the Statute, it cannot be exercised on behalf a creditor, except "in the same manner, and subject as nearly as may be to the same rules as in the case of a judgment at law in a civil action."

On behalf of the plaintiff it is contended that the debt in question is not attachable at all; and the old cases of *Coppell v. Smith*, and *Grant v. Hawding*, 4 T. R. 312 (referred to in Ch. Arch. p. 713), are relied upon in support of this contention. Those cases were decided long before the C. L. P. Act, and before the passing of the Acts enabling moneys, ordered to be paid under orders of Court, to be recovered by process of execution, and declaring that such orders shall be deemed a judgment, and the person to receive payment a creditor, and I think are now of doubtful authority in this country.

In *Clark v. Perry*, 26 L. T. Rep. 46, an equitable debt which had been ascertained by the Master's Report, but which had not then been ordered to be paid by the order of the Court, was held not to be attachable; but it was not denied that if there had been a decree of the Court for payment at the time the attaching order was made, that the debt would have been attachable.

I am of opinion that this debt is one that could be attached.

It is further contended by the plaintiff that even if the debt were attachable, this attaching order should be set aside, because the plaintiff's solicitor has a lien on the costs in question.

I think it is clear that the plaintiff's solicitor has this lien, and it would seem that it is such a lien that it could not be defeated by the plaintiff voluntarily releasing the party ordered to pay: *Ex p. Bryant*, 1 Mad. 49. So also it would seem the solicitor may give notice to the party ordered to pay, not to pay the money until his costs are satisfied. And if after such notice payment be made, the party paying will be liable to pay over again to the solicitor the amount of his lien: *Cowell v. Simpson*, 16 Ves. 275; *Beames' Costs*, 318.

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COTTON v. VANSITTART.—DUNN v. McLEAN.

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The plaintiff's solicitor having this lien, however, would seem to be no bar to an attachment of the debt in respect of which the lien exists, as between the plaintiff and the attaching creditor: *Reg. v. Benson*, 2 Prac. R., 350, *Bank of Upper Canada v. Wallace*, *Ib.* 352; and that being the case, can the plaintiff now apply to set aside this order which, as far as he is concerned, is to all intents and purposes valid and binding to the extent of any beneficial interest he may have in the costs in question? I think not. If this application had been made on behalf of the solicitor personally, I think there can be no doubt it should have been granted.

In the case of the *Jeff Davis*, L. R. 2 A. & E. 1, a fund in Court had been attached, but it was there held the lien of the proctor could not be defeated by the attaching order. And in the later case of the *Leader*, *Ib.* 314, money which was subject to a lien of a solicitor having been attached, and subsequently ordered to be paid over, and the garnishee neglecting to bring the existence of the lien to the attention of the judge by whom the order to pay over was made; it was held upon the application of the solicitor claiming the lien that the garnishee was bound to pay over again so much of the debt as was necessary to satisfy the lien. See also *Sympson v. Protheroe*, 26 L. J. Chy. 671; *Eisdell v. Cunningham*, 28 L. J. Ex. 213. See, however, Eng. C. L. P. Act, 1860, ss. 29 and 30.

That case and the others which were cited on the argument would have been quite sufficient authorities for granting this application if it had been made by the solicitor personally.

The defect in the proceedings, however, I think, is one of form rather than of substance. The application, though made in the name of the plaintiff, has been made in the interest and for the benefit of the solicitor, and the question has been fully discussed on the merits. I think, therefore, I should allow the plaintiff's solicitor to join in the application as an applicant, and, if necessary, the notice of motion may be amended, or a petition may be filed returnable instanter. The applicant's proceedings, however, being defective, I think he should get no costs of this motion.

The attaching order will, therefore, be discharged without costs, there being no other debt sworn to by the attaching creditor except that in respect of which the lien exists. See *Boyd v. Haynes*, 5 Prac. R. 15.

Order granted.

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Amending—Adding and striking out parties under the common order to amend.

A party plaintiff may be added under a *præcipe* order to amend.

Neither a party plaintiff nor a party defendant can be struck out under an order to amend obtained *ex parte*.

[June, 27, 1873.—Referee.]

Under a *præcipe* order, the plaintiff had amended her bill by adding as co-plaintiffs persons to whom she had, after the filing of the bill, conveyed in pursuance of an agreement entered into before the bill was filed, and by which these persons became interested in the subject matter of the suit along with the plaintiff, she having taken a mortgage back to secure the purchase money.

This was a motion by the defendant A. J. McLean, to take the amended bill off the files, or to set aside the amendments.

W. R. Mulock, for the motion. The General Orders do not authorize the addition of parties under a *præcipe* order to amend. Con. Order 348, permits an amendment by the addition of facts and circumstances by Con. Order 344, parties may be added but only upon a special application. By the conveyance, the original plaintiff lost her interest, and though, by taking the mortgage back, she again acquired an interest. It was a new interest, and the suit should be revived. See *Daniell's Prac.* pp. 251, and 252, (5th ed.); *Loch v. Bagley*, 1 W. N. 65; and *Attorney General v. Avon*, 11 W. R. 1050.

Hamilton, contra, cited *Hitchins v. Congreve*, 1 Sim. 500, 5 L. J. Chy. 176; *Attorney General v. Marsh*, 16 Sim. 572; and *Bank of Montreal v. Auburn Exchange Bank*, 1 Chy. Ch. 283.

M.R. HOLMESTED.—A defendant cannot be struck out *ex parte*, as he may thus be deprived of costs. Neither can a plaintiff be so struck out as the defendant's security for costs is thus lessened; but by adding a plaintiff, the defendant's security is increased, and *Hitchins v. Congreve*, is an express authority for the addition of a party plaintiff by the common order.

I do not think that there is a transmission of interest in this case, so as to render a revival of the suit necessary. The plaintiff is not deprived of her right; she only says that the parties added as plaintiffs are entitled along with her.

Motion refused with costs.

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Vendor and purchaser—Incumbrances not covered by vendor's covenants.

After a conveyance incumbrances upon the property sold were discovered, created by a former owner, but of which neither the vendor nor the purchaser had been previously aware. The covenants given by the vendor only extended to his own acts and the acts of those claiming under him.

Held, that the vendor was not bound to pay off the incumbrances; and therefore that the purchaser was not entitled to set off against them a balance of his purchase money remaining unpaid and secured by mortgage.

[June 4, 1873—Referee—Chancellor.]

The facts upon which this matter came before the Court appear from the following admissions signed by solicitors of the parties: "It is hereby admitted that Jonathan Baird purchased from Lewis Moffatt parcels 1 and 2 of the property sold in this cause; that Lewis Moffatt conveyed the said land to Baird receiving \$500 in cash, and a mortgage for \$500; that the whole purchase money was \$1000; that Jonathan Baird has paid \$250 for principal on the mortgage with some interest, and that the sum of \$250 and some interest remain unpaid; that at the time of the said purchase and conveyance of the said lands it was supposed by both parties that the said Lewis Moffatt had an unencumbered title to the said lands, and the said Lewis Moffatt supposed he was selling the said lands to the said Baird free from incumbrances; that the said Baird verbally agreed to pay the sum of \$1000 for the property, free from incumbrances, which agreement was carried into effect by the deed to Baird hereafter mentioned, and he paid the said money and gave said mortgage under the impression and belief that said lands were unencumbered; that since the conveyance to said Baird, which was by deed under the statute with limited covenants, it has been determined that the creditors' claims proved in this matter form an incumbrance upon said property.

"Dated June 6th, 1873.

"(Sgd.) HECTOR CAMERON,
Solicitor for Lewis Moffatt.

"(Sgd.) JOHN BAIN,
Solicitor for Jonathan Baird."

The defendant Baird now moved for payment out to him of the whole of the money remaining in Court in this cause, claiming that he was entitled, for the liquidation of the incumbrances, to that

portion of the money in Court which Mr. Moffatt would, but for the existence of the incumbrances, have been entitled to, as the balance due upon the mortgage from Baird to him, above mentioned.

J. Bain, for defendant Baird.

Hector Cameron, Q.C., for Lewis Moffatt.

MR. HOLMESTED.—I do not think the defendant Baird is entitled to be relieved from the payment of the balance of his purchase money secured by his mortgage to Lewis Moffatt. In all the cases relied on by Mr. Baird's solicitor there was a legal liability on the part of the mortgagee to discharge the prior incumbrance. In this case there is no such liability. It is admitted that Mr. Moffatt's covenants do not extend to the payment of the incumbrance in question, but it was urged that before conveyance the purchaser would be entitled to have applied any part of his unpaid purchase money to paying off incumbrances, and that this equity still exists, notwithstanding the taking of a conveyance with covenants limited merely to the acts of the vendor. The observations of the Chancellor in *Henderson v. Brown*, 18 Gr. 81-2, seem to give some colour to this construction, but in that case the incumbrance was one *within* the covenants of the vendor, and one that he was legally bound to discharge, and therefore it was unnecessary to decide in that case whether the purchaser's right to apply his unpaid purchase money in the satisfaction of incumbrances would extend to an incumbrance *not* within the vendor's covenants. Mr. V. C. Mowat, on the other hand, 18 Gr. 84, seems clearly to approve of Lord St. Leonards' statement, where he says, (V. & P. ch. 13, sec. 2, 13) "It seems clear that if the conveyance be actually executed the purchaser can obtain no relief, although the money be only secured," as applied to an incumbrance *not* covered by the vendor's covenants.

There is an old case referred to by Lord St. Leonards in the section quoted from *Anon.* 2 Chy. Ca. 19, where A. had sold to B., *with covenants only against A.*, and all claiming by, for, or under him, and B. secured the purchase money, but before payment the land was evicted by a title paramount to A.'s; the Lord Chancellor relieved from the payment of the purchase money. (These are the facts as given by Lord St. Leonards; the report itself, however, is not so full.) But Lord St. Leonards goes on to

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observe, "If this case were law the consequences would be serious, for what vendor would permit part of the purchase money to remain on mortgage of the estate if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted. Indeed this point is viewed so differently in practice that when part of the purchase money is permitted to remain on mortgage, although the covenants from the vendor are *limited*, the vendor invariably enters into general unlimited covenants, in the same manner as he would have done in the case of an independent mortgage." (a)

How Baird, the mortgagor, has covenanted in the present case does not appear, but whether his covenant to Moffatt be limited or unlimited can practically make little difference. To admit the right he now claims is in effect to make a new contract between him and Moffatt, this vendor, (see Rawle on Covenants, pp. 613, *et seq.*) for notwithstanding he has accepted the *limited* covenants of his vendor, he is now in effect seeking to give an *unlimited* effect to them. I do not think there is any authority for this construction except the anonymous case in question, the authority of which is so doubtful that I do not think I ought to act upon it.

—

From this decision the defendant Baird appealed. The appeal was argued before the Chancellor, who gave judgment as follows :—

SPRAGGE, C.—The Referee in Chambers ordered that out of the moneys in Court there should be paid to Moffatt the balance due to him by Baird upon his mortgage, and Baird now by appeal from the Referee raises the question whether, under the circumstances stated in the admissions Moffatt is entitled to the balance due upon his mortgage.

A vendor is liable to indemnify the purchaser against incumbrances where the covenant is general, and also where he knows of the existence of an incumbrance which he conceals from the purchaser; in which latter case he would be entitled to relief on the ground of fraud. Here the covenant or covenants, as appears by the admissions were limited to the acts of the vendor, and those claiming under him; and it is expressly admitted that the vendor as well as the purchaser supposed the title to be unincumbered.

Under such circumstances it is clear from the English authorities that the purchaser has no remedy either at law or in equity. The cases are collected in Lord St. Leonard's work on Vendors and Purchasers, and he lays down the general rule shortly thus "If the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase money either at law or in equity." That the learned writer considers a mortgage, created by a former owner to fall within the rule is clear, for commenting upon *Howes v. Brushfield*, 3 East 491, where it had been held that an arrear of quit-rent which was due at the time of the conveyance was within a limited covenant for quiet enjoyment, he observes in disapproval of the decision p. 602, "The clear intention of the parties was that the vendor should covenant against his own acts only; and yet it should seem that the argument of the Court would apply as well to a mortgage or any other incumbrance created by a prior owner as to an arrear of quit rent, in payment of which a former occupier made default. The reader should be cautious how he applied this decision to cases arising in practice as it may lead him to draw conclusions not authorized by prior decisions." Lord St. Leonards would not have put the case of a mortgage or other incumbrance created by a prior owner, as an illustration, if he had not considered it perfectly clear that a limited covenant would not extend to it.

In favor of Baird's contention the case of *Henderson v. Brown*, 18 Gr. 79, before this Court upon rehearing is referred to; but in that case the mortgage which was in question was a mortgage executed by the vendor himself, and which, by agreement between him and the purchaser was to be removed by the vendor. It was clearly within the covenant: and the question was not between the vendor and the purchaser, but between the purchaser and the assignee, with notice of the facts, of a mortgage given by the purchaser to the vendor for unpaid purchase money. The question that is now before me did not arise in that case, and the Court certainly did not mean to decide, and did not decide, that a limited covenant by the vendor against incumbrances extends to incumbrances created by a former owner.

I am of opinion that the learned Referee was right in the conclusions at which he arrived, and that the appeal should be discharged with costs.

(a) See Mr. Rawle's observations on this case.—Rawle on Covenants, p. 619, 4th ed., in note.—REP.

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A point was touched upon in the course of the argument by Mr. Bain which I have not before me the material to decide upon; nor was it, that I am aware of, before the Referee. I understood Mr. Bain to say that Moffatt was a purchaser at a sheriff's sale of the equity of redemption of the former owner of the land sold by him to Baird, by which former owner a mortgage was created which Baird has been called upon by the mortgagee to pay off; and I understood Mr. Bain's contention to be that under the Common Law Procedure Act, Con. Stat. U. C., ch. 22, sec. 259, it was the duty of the purchaser, as between himself and the mortgagor, to pay off this mortgage; and that Baird, occupying now the position of the mortgagor, his rights as well as his liabilities have devolved upon him; and that he has an equity to require Moffatt to pay off this mortgage and an equity to retain in his hands money that would otherwise be payable to Moffatt to exonerate the land from a charge, from which it was, and is, the duty of Moffatt to exonerate it. Mr. Bain did not put his position in this form, but I sup-

pose that is what is contended for. On the other hand Mr. Cameron denies that the land was sold as an equity of redemption, or that the mortgagee has enforced payment, and I observe that the administrators are silent as to any money paid or payable by Baird. They only state that since the conveyance to Baird "it has been determined that the creditors claims proved in this matter form an incumbrance upon the said property.

Besides, the question before me is by way of appeal from the Referee, and I ought not to hear any questions that were not before him. I only allude to it now that it may be understood that in dismissing the appeal I express no opinion upon the point raised by Mr. Bain under the Common Law Procedure Act.

Appeal dismissed.

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COMMON LAW CHAMBERS.

FRALICK V. DORMYN.

Ejectment—Better particulars of title—Application before appearance.

Held, that an order for better particulars of title, may in ejectment, be made before appearance is entered.

[April 8, 1873.—*Mr. Dalton.*]

W. S. Smith shewed cause to a summons for better particulars of title, and objected that the application was made before the defendant had entered an appearance, and consequently could not be entertained.

Mr. Pepler (Harrison, Osler & Moss), contra, cited *Watson v. Brewer*, 4 Prac. R., 202, and Harrison's C. L. P. Act (2nd ed.) pp. 511 & 202, to shew that such an application could be made before appearance.

MR. DALTON made the summons absolute, with a stay of proceedings until the particulars should be delivered.

Order accordingly.

CHAMBERS V. UNGER.

Ejectment—Security for costs—Con. Stat. U. C. cap. 27, sec. 76.

Held, on an application for security for costs under the above section, that the fact of the costs of the former unsuccessful actions having been paid, is not a ground for refusing to make an order.

[April 18, 1873.—*Mr. Dalton.*]

Mr. Pepler (Harrison, Osler & Moss), moved absolute a summons for security for costs in an ejectment suit, on the ground that there had

been three former unsuccessful actions of ejectment brought by the same parties, and those under whom they claimed, for the same land. The application was made under Con. Stat. U. C., cap. 27, sec. 76.

Meyers, contra. The costs of these former actions have been paid, and under these circumstances an order should not be made.

MR. DALTON made the summons absolute, on the ground that under the wording of the section, the fact of the costs of the former action having been paid, did not necessarily afford a ground for refusing to make an order.

Order accordingly.

McCALLUM V. THE PROVINCIAL INSURANCE COMPANY.

Service of papers.

A notice of trial was put under the door of the office of defendant's attorney (the door being locked) about half past five o'clock on the last day of service. It did not come into the hands of the defendant's attorney until next morning.

Held, that the service did not count until the latter period.

[April 18, 1873.—*Mr. Dalton.*]

H. Duggan obtained a summons to set aside the notice of trial in this case, on the ground that it was not served in time.

Osler shewed cause. It appears that the notice was put under the door of the office of the defendant's attorney, at about half-past five P.M., on the last day for service, there being, at the time, no one in the office, and the door

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being locked. By rule of Court attorneys must have an office at which papers, not requiring personal service, may be served. The notice of trial can be served any time before seven, and consequently there should be some one in the office, up to seven P.M., to receive papers. If there was no one in the office the service should be good from the time that the paper was put under the door. See *Cerew v. Winslow*, 5 Dowl. 543; *Burdett v. Lewis*, 7 C. B. N. S. 791; *Warren v. Thompson*, 2 Dowl. P. C. N. S. 224; *Braham v. Sawyer*, 1 D. & L. 466; *Francis v. Beach*, 9 U. C. L. J. 266; and *Wright v. Perkie*, 2 C. L. J. N. S. 267.

Duggan, contra. The fact was that the plaintiff had neglected to declare until long after appearance was entered, and consequently it was through his negligence that the notice of trial was served so late. The office was open during ordinary business hours, and the plaintiff should have served his notice during those hours, or else have served it personally on the attorney. The service is good, but should not be counted until the notice came into the hands of the defendant's attorney, on the morning after it was put under the door. The expression used in the case of *Burdett v. Lewis*, which declares that such service is good if the paper comes *duly* into the possession of the attorney, must be construed to mean that it must come into his possession in a proper manner and in due time. See Arch. Prac. 166: *Brandon v. Edmonds*, 2 Dowl. P. C. N. S. 225; and *Strutton v. Hawkes*, 3 Dowl. P. C. 25.

MR. DALTON.—I think the cases, and especially *Consumers Gas Company v. Kissock*, 5 U. C. Q. B. 542, and *Francis v. Beach*, 9 U. C. L. J. 266, shew that the service of the notice of trial is good, but must be counted only from the time that it was received by the attorney on the following morning after that on which it was put under the door. The notice must therefore be set aside, on the ground that it was served one day too late.

Order accordingly.

CARNEGIE V. RUTHERFORD.

Service of papers—Notice of trial—Wrong style of cause.

A clerk, on the last day for notice of trial, while on his way to serve it, met the defendant's attorney's partner, who told him to go to the office and serve it there. When he arrived no one was in: he put it under the door, and it was not received until next day. The Christian name of defendant was wrong in the style of cause.

Held, that the manner of service was good on the ground that the partner of the attorney refused to receive the papers, but that the style of cause being wrong, the notice must be set aside.

[April 27, 1873.—*Mr. Dalton.*]

In this case an agreement had been made between the attorneys for the plaintiff and for the defendant, who were both country practitioners, to serve papers by mail. The declaration, however, with a notice to plead, was served on the Toronto agents for the defendant's attorney. A summons was taken out to set aside the notice to plead as only giving eight days time instead of ten days, under 34 Vict., cap. 12, sec 12, as decided in the case of *Moffatt v. Evans*, ante p. 16. This summons was finally disposed of on the 21st of April, the last day for notice of trial.

The plaintiff, in order to get down at the coming Assizes, sent by telegraph the issue, issue book, and notice of trial, to his agent in Stratford, to be served on the defendant's attorney, who resided there. About half-past six of the same evening, a clerk in the office of the agent, while on his way to serve the papers, met the defendant's attorney's partner, and told him he had some papers for him. The latter replied that he did not wish to take any papers in that suit, and told the clerk to take them to the office and serve them on his partner. When the clerk arrived at the office the door was locked, and he put the papers under the door. The attorney himself did not leave the office till after six.

Mr. Pepler (Harrison, Osler & Moss), moved absolute a summons to set aside the notice of trial, on the ground that it was served too late, and also on the ground that the Christian name of the defendant was inserted as Chester instead of Charles. The service should be counted only from the time the notice of trial reached the hands of the other side. The mere fact of his partner being told that there were some papers for him in that suit, did not make it good. The clerk should have served them on him. If he

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had been told a week before that the papers were to be served, it would not affect the question, and it should not do so now. There must either be an actual service, or, if left in the office, a receipt on the same day, between the proper hours for service. The style of cause being wrong clearly invalidated the notice. See *Sprague v. Henderson*, 1 Chy. Ch. 213, and *McCallum v. Provincial Insurance Co.*, *ante* p. 101.

Mr. Ermatinger (Read & Keefer), contra, urged that there was bad faith on the part of the partner of the attorney for the defendant, in not receiving the papers when shewed to him. He had notice, and that should be sufficient. The error in the style of cause was merely a clerical error of the operator, and a technical one, and not one which, by the cases, should invalidate the notice : *Doe d. Read v. Paterson*, 1 Prac. R. 45.

MR. DALTON.—I think that the service in this case was good, as there was a virtual refusal on the part of the attorney's partner to receive the papers ; but the style of cause being wrong is a fatal error. The order must go.

Order accordingly.

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Administration of Justice Act, secs. 59, 64—Construction of Statute—Meaning of "section"—Maxim, "Expressio unius," &c.

Held, 1. That under secs. 59 and 64 of the Administration of Justice Act, 1873, there should be no County Court Sitting in May of that year.

2. That the word "Section" does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment of which there may be several included under one number.
3. Consideration of conflicting clauses in same Act.
4. Application of the maxim, "*Expressio unius est exclusio alterius.*"

[May 1-5, 1873.—*Mr. Dalton—Richards, C. J.*]

This was an application to set aside a notice of trial given for the County Court of the County of York, at a sitting of that Court, which the plaintiff assumed was then about to be held on the 13th of May then next.

The question in dispute arose on the construction of secs. 59 and 64 of the Administration of Justice Act of 1873. These sections are as follows :—

Sec. 59. "In addition to the sittings of the Courts of General Sessions of the Peace and of the County Court of the County of York now held in and for the County of York, there shall be held in each year a fourth sittings thereof respectively, to be held on the second Tuesday in September of each and every year, and the sittings of the said General Sessions of the Peace and of the County Court of the County of York now by law directed to be held on the second Tuesday in the month of June shall be held on the second Tuesday in the month of May, including the present year."

Sec. 64. "Sections 46, 47, 51, 56, 57, 58, 62, and 63, of this Act, and so much of the 59th section as relates to the sittings of the County Court in September of every year, shall go into force forthwith, and the other sections shall go into force on and after the first day of January next."

Delamere, shewed cause.

Francis, contra.

MR. DALTON.—The important question is, whether upon the construction of clauses 59 and 64, of the Administration of Justice Act lately passed, a sitting of the Court will be held on the 13th of May next. I have come to the conclusion that no such sitting can be held—and I have been led to it by the following considerations :—

The date of the assent shall be the date of the commencement of an Act, if no later commencement shall be therein provided : Stat. 31 Vict. ch. 1, sec. 4, (*Interpretation Act.*) Therefore the Administration of Justice Act of 1873 would be in force now in all its clauses, were it not for clause 64, which postpones its operation as, and to the extent in clause 64 expressed. In all respects in which that clause does not postpone the operation of that Act, it is in force now. Then clause 64 brings into immediate operation clauses 46, 47, 51, 56, 57, 58, 62, and 63, and so much of section 59 as relates to the sittings of the County Court in September, and it enacts that "the other sections" shall go into force on and after the first day of January, 1874.

The question is, as to the residue of clause 59. Is it in force now or not? Is the residue of

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clause 59 included in "the other sections" in clause 64?

I will first suppose it is not. Then by the express enactment of sec. 64, that part of sec. 59 which relates to the Sittings of the County Court in September is in force now, and as to all the rest of clause 59, that too must be in force now, if it is not included in the words "the other sections," for if it is not postponed by sec. 64, it must fall under the general rule, and be in force from the assent to the Act. From this it would follow that the whole of sec. 59 is in force—that part as to the September County Court by express enactment, and the rest of the clause because its operation is not in any way postponed, and if this be so there will be a County Court and General Sessions in May, and a County Court and General Sessions in September. But can that possibly be the intention? I think not, as may be demonstrated.

The construction of an Act, whatever the rules which are to guide in arriving at it, must be what we believe is the *expressed intention*.

I would say that the clauses 59 and 64 do not raise an inconsisstency which it is necessary to reconcile. Clause 64 is inserted for the purpose of defining the times at which the several clauses shall come into operation, and so regulating those other clauses, and for no other purpose. If it is inconsistent with any other clause it must be regarded as an afterthought and change of intentions in this respect. See as to this the judgment of Lord Tenterden in *Rex v. Justices of Middlesex*, 2 B. & Ad. 818, 821, citing *Attorney-General v. Chelsea W. W. Co.*, Fitzgibbon 195—the latter a case very much in point. As far as clause 64 enacts it must therefore govern, and from the very purpose of clause 64, it follows that it must necessarily be inconsistent with the other clauses, or it would not have been inserted at all. Further the expression in clause 59 "*including the present year*" (which applies only to the May Courts) is nothing more than the law would imply if those words were not there.

I think the residue of clause 59 cannot be excluded from the words "the other sections" in clause 64, from the following considerations:—

Clause 64, seems to be intended to declare the times for the Act coming into force, and it does declare them as to every part of the Act—unless it be those portions of clause 59, and it seems not likely that it could have been the intention

to omit so small a part, where all the rest is declared. In saying this I do not lose sight of the words "*including the present year*" in the 59th clause. And if any one shall attribute force to these words, an answer is that they are not applied at all to the enactment of sec. 59, as to the September General Sessions. This fact must be borne in mind in all that I have further to say.

Then, as to the expressed intention, what could be the purpose of inserting in clause 64, an express provision as to "*so much* of the 59th sec. as relates to the Sittings of the County Court in September?" If it were intended that the whole clause should come into operation forthwith, why was not clause 59 inserted in sec. 64 after clause 58, without any special mention of the September County Court? That would have been the natural way of expressing such a purpose. To my apprehension those words are meant to contradict the enactment as to the September County Court, from the rest of clause 59. And if so at *what time* is the rest of clause 59 to come into operation?

Again can this half section, with propriety, be held to be included in the words "the other sections" in clause 64? First observe that it says "*the other sections*." The word section has no technical meaning, nor indeed any very exactly defined meaning. No doubt it is usually applied to the numbered paragraphs of an Act, and in this very clause 64 it is used in that sense, but it does not necessarily mean that. It means a part divided or cut off, and it seems to me that after excepting a portion of clause 59, and then referring to "*the other sections*" of the act in a clause like 64 which seems to be purposed to declare the time of the Act taking effect, it may without any straining of language be held to apply to the residue of clause 59, if the apparent dominant intention of the Legislature require it. If a piece of chalk were broken in two each half would be a piece of chalk, and so if the section of an Act consisting of distinct parts, be divided, I do not see why each part should not, in one sense, be called a section, because each is really a distinct enactment, although each would not be a numbered paragraph. In our Real Property Act the same word "Rent," occurring repeatedly throughout the Act, is construed in three different senses, because the general intention required it: Leith's Blackstone, pp. 206, 208. I put great stress here upon the expression, "*the other sections*," as though it were intended to include all the rest of the Act.

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Then, as to the necessity of construing the Act, as in the last paragraph suggested. If the enactment in clause 59, as to the September General Sessions, is not within the words "the other sections," in clause 64, it seems to me it must come into force at the passing of the Act or never come into force at all. Should any one think this proposition untrue, I would ask him to consider *at what time*, in such ease, it comes into force, if not at the passing of the Act, and why. I think the proposition is true, but the supposition that the enactment is intended never to come into force is absurd—therefore it must come into force at the passing of the Act. Remembering then that it is the *expressed intention* that we are looking for, and that clause 64 enacts that "*so much*" of 59 as relates to the County Court in September, shall come into immediate operation, and that it is silent as to the General Sessions for that term, and as to all the rest of clause 59, the spirit of the maxim, "*Expressio unius est exclusio alterius*," applies, and to ordinary apprehension, what is said and what is omitted, together distinctly convey the intention of the Legislature that the residue of clause 59 shall *not* come into immediate operation. It is indeed a very strong expression, by exclusion, of that intention. The above maxim of construction has been lauded as one naturally arising—being a principle of logic and common sense, and never more applicable than when used in the interpretation of a Statute : Broom's Legal Maxims, 5th ed., 664, 667. But, I take it, it affords from necessity just as strong an indication of another intention, which is, that the words "the other sections" shall include the residue of clause 59, because, if not, the enactment as to the September General Sessions must either come into force at the passing of the Act, which I think is proved to be against the intention, or never at all. The words in section 59, which apply to the holding of the May Courts,—“including the present year,”—can make no difference—for they merely express what the law, in the construction of section 59, would imply, if these words were not there, and the enactment as to the May courts must still be controlled by section 64, as being within “the other sections.”

I therefore feel forced, step by step, to the conclusion that the whole of section 59 is postponed till January, except the part as to the County Court in September, and that, consequently, there is no sitting of the County Court this May.

The notice of trial must be set aside, but without costs.

Order accordingly.

From this order the plaintiff appealed to

RICHARDS, C. J.—I quite concur in the conclusion arrived at by Mr. Dalton in his able judgment. I have also had the opportunity of consulting the Hon. the Chief Justice of the Court of Common Pleas on the subject, and he authorizes me to say that he is of opinion that that portion of the 59th section of the Act for the better Administration of Justice which provides for the Sitting of the County Court of the County of York, on the second Tuesday in the month of May, does not come into force until the first day of January next.

If that portion of the Act is now in force, then the whole section would seem to be in force, and if that was the intention of the Legislature it would have been much easier to have said that the 59th section shall go into force forthwith, than merely that so much of it as relates to the Sitting of the County Court in September of every year, shall go into force forthwith. I do not think, however, there is any mistake or inconsistency in the matter. It is probable when the Statute was introduced it was intended to bring the whole Act into operation at once. On further consideration it was no doubt thought better to postpone the bringing into force the principal enactment until after the first of January next, and therefore it was quite proper to postpone, until that period, the operation of all the sections that were framed with a view to carrying out the main portions of the Bill.

One of the prominent features of the Act was a fourth sittings of the Courts of Assize and Nisi Prius and Oyer and Terminer for the County of York. That sitting was to be held between the end of Easter Term and the beginning of the long vacation in July. Now the end of Easter Term of this year is Saturday the 7th of June. The second Tuesday of the month of June will be the 10th of June. If the County Court were to sit for a fortnight it would cover a portion of the same period for which the additional Assize Court would be sitting under the new enactment for that purpose, if it had come in force. To prevent this, the change was provided for in the Bill of having the sittings

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of the County Court on the second Tuesday of May instead of the second Tuesday in June. But as it was thought better that the additional sitting of the Assizes should not be held this year, therefore it was unnecessary to change the time for holding the County Court and the Court of General Sessions from June to May, and consequently that portion of section 59 which relates to the change need not be brought into operation until the rest of the Act was.

It was felt to be an evil that County Court cases were rushed in upon and swelled the dockets at the Assizes, particularly in the Fall, to the prejudice of the legitimate business belonging to the latter court. The County Court sittings in the County of York, for the trial of issues of fact, being in June, were not held again until December, a period of six months, and the Fall Assizes intervening, the evil referred to was felt to be pressing, and would be quite as much felt at the coming Fall Assizes as at any time. Principally to relieve this undue pressure of County Court business on the Assizes, the fourth sittings of the County Court and General Sessions was provided for in the Bill, and as no practical inconvenience would result from bringing that provision of the Statute into force, it would naturally occur to any one who knew of the evil complained of, that the pressure of business of the Fall Assizes of this year might be very much relieved by having a sitting of the County Court in September. If that idea was present to the mind of the framer of the sixty-fourth section he would be likely to make some provision in it for holding the September sittings of the County Court, and the words he has used shew that he did entertain the intention, and he seems to have used words to carry it out.

I see no reason why the simple, plain intent to be gathered from the 64th section, that only so much of the 59th section as relates to the sittings of the County Court in September should go into force immediately, and that the operation of the rest of the Act not brought into force immediately by the words of the 64th section, should be postponed until after the 1st January next.

I think the summons to set aside Mr. Dalton's order should be discharged. I do not understand the parties supporting the order ask or desire costs, and therefore I say nothing about costs.

Appeal dismissed.

MITCHELL v. ROBERTS.

Law Reform Act—Postponing trial..

It is no answer to an application to try a cause in a County Court, on the ground that no difficult questions of law will arise, to put in affidavits which are [properly grounds for postponing the trial.

[June 5, 1873.—*Mr. Dalton.*]

Mr. Gordon (Blake, Kerr & Boyd), moved absolute a summons to try the cause in the County Court, on the ground that no difficult questions of law would arise.

Brooke, contra, as an answer to the summons read affidavits in which it was stated that the defendant was a mariner, and was away on a voyage, and that it would be impossible for him to attend at the trial. It would also be impossible to procure the attendance of several important witnesses in time for the sittings of the County Court, at which it was proposed to try the cause. The affidavits also stated that there was a cross claim of the defendants which it would be impossible for him to recover if the plaintiff was enabled to enter judgment for his debt first.

MR. DALTON.—These are grounds, or may be so, for postponing the trial, but form no answer to the present application. The party desiring to postpone the trial must make a substantive application for that purpose. Neither can the question as to the cross claim be taken into consideration.

The order, therefore, must go, if before tomorrow an application is not made to postpone the trial, or to refer the case to arbitration.

Order accordingly.

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McDERMOTT V. ELLIOTT.

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McDERMOTT V. ELLIOTT.

Law Reform Act—Expediting clause—Amendment.

Held, in a case proper to be brought down to the County Court by the Law Reform Act of 1868, and where the entry under Form A is omitted from the issue book, but notice of trial is for the County Court, that the omission is not properly a ground for setting aside the issue book and notice of trial, but that the plaintiff will be allowed to amend on payment of costs.

[June 9, 1873.—*Morrison, J.*]

J. B. Read moved absolute a summons to set aside an issue book and notice of trial, on the ground that there was no expediting clause or entry in the issue book, as required by sec. 17 of the Law Reform Act.

Hagley, contra, acknowledged the irregularity, and asked leave to amend.

Read urged that the omission was fatal, and that the amendment should not be allowed.

MORRISON, J. I am of opinion that the entry need not be made in the issue book, but it is sufficient if inserted in the record. In this case it does not appear in either, but as, if the plaintiff had asked for leave to amend, an order would have been granted on such application, the amendment now asked will be allowed on payment of four dollars costs.

Order accordingly.

IN RE SMITH V. THE CANADA CAR COMPANY

Transfer of shares in a chartered company—Power of directors to refuse to register.

Held, that a Company incorporated under the provisions of 27 & 28 Vic. chap. 23, has not power to refuse to allow a transfer of shares of its stock without assigning a sufficient reason therefor.

[July 28, 1873.—*Richards, C. J.*]

In this case a summons was taken out to shew cause why a *mandamus* should not issue to compel the Canada Car Company to consent to the assignment or transfer of certain shares of the stock of the Company from a shareholder to an outsider.

Mortimer Clarke shewed cause. The transfer of stock in an incorporated company, to persons to whom the company objected, might seriously

militate against the interests of the company. Under the seventeenth sub-section of section five of the Statute, the company has power to make by-laws regulating, (among other things) the transfer of stock. By-laws 29 & 30 of the company declare that no shareholder shall make any transfer of his stock, or any part of it, without the consent of the directors; and that no transfer shall be valid until after such consent has been obtained. By the Act, the directors of the company have power to pass these by-laws, and they must be valid. Sub-section nine of this section, also makes all transfers "subject to all such conditions and restrictions as by the letters patent, or by the by-laws of the company shall be prescribed."

Bain, contra. Under sub-section seven, the directors have power to make by-laws "regulating" the transfer of stock, &c. This means by-laws as to the manner of transfer, the method of entering the transfer in books, and in fact all things really regulating the transfers, &c. They have no power to refuse to permit a transfer; at all events without assigning a good and sufficient reason for such refusal. Sub-section fourteen of the same section, says, that "no share shall be transferable until all previous calls thereon shall have been fully paid in, or until declared forfeited for non-payment of calls thereon, or sold under execution." All the calls in this case have been paid up, and this sub-section impliedly declares that shares shall be transferable unless the company have a lien on them. See *Robinson v. The Chartered Bank of India*, 35 Beav. 79; *Tajt v. Harrison*, 10 Hare 489.

RICHARDS, C. J.—In *Norris v. Irish Land Co.*, 8 E. & B. 512, on a question as to registering the transfer of shares, Lord Campbell said "in the case now before us, a prerogative writ of *mandamus* would have been granted." In *Re Guillott v. Sandwich and Windsor Plank Road Co.*, 23 U. C. 246, the point was taken that a *mandamus* would not lie; the Court do not decide the question, but refuse to make the rule absolute, because there was no proper evidence of demand or refusal to transfer the shares after the company had notice of their sale by the sheriff. It is true, that under the Act of Parliament, it was the duty of that company to transfer the shares, but here there is no express *duty* except as under the charter and by-law.

In *Weston's* case, L. R. 4 Ch. Appeals 20, 27, *Page Wood*, L. J., refers to the desire of a company to prevent unlimited powers of assignment when

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power is given to the directors to reject members. He cites *Shortbridge v. Bosanquet*, 16 Beav. 84; *Burgate v. Shortbridge*, 5 H. of L. Cases, 297, as being cases of that kind.

It was provided that no person should become a shareholder without the consent of the directors of a joint stock banking company; and there was a further provision in the deed of settlement that, if the board refused, the directors would purchase the shares out of the funds of the company. The question, whether the board were justified under the facts in refusing either to permit the transfer or to purchase for the company, was a question to be tried in equity: *Taft v. Harrison*, 10 Hare, 489.

In *Robinson and the Alliance Bank v. The Chartered Bank of India*, 35 Beav. 79, in the deed of settlement, article 49, was, "No person not being a lawful claimant shall be entitled to become a transferee of a share unless and until he be approved by the Court." The Master of the Rolls was of opinion that the board of directors must exercise the powers given them reasonably; and that to refuse to allow any transfer to be made to anybody, would not be a reasonable exercise of their powers.

In *Poole v. Middleton*, 29 Beav. 646, 650, the Master of the Rolls draws a distinction between ordinary partnerships and joint stock companies. In an ordinary partnership, every partner has a share in the management, and they may stipulate against new partners being introduced. But shares in joint stock companies which do not belong to the directors, are perfectly distinct from such cases. In another part he says, the mode of transfer must be approved by the board of directors, who cannot exercise an arbitrary and unreasonable will on such an occasion, or reject the mode of transfer in this instance, which they approve and allow in other cases.

I think the case of *Norris v. Land Co.*, 8 E. & B., already referred to, is an authority that under our Statute of Ont., 35 Vict. cap. 14, the writ of *mandamus* may go in a case like the present. In the case referred to, the duty to register the transfer of stock, arose under the Royal charter and deed of settlement under it, approved by the Board of Trade. Here the duty arises under the Statute and the charter granted under it. The Statute 27-28 Vict. cap. 23, requires certain provisions contained in the statute to be inserted in the charter, amongst other things that the directors might, from time to time, make by-laws not contrary to law, to

regulate the allotment of stock, the making calls thereon, the payment thereof, the issue and registration of certificates of stock, &c., &c., the transfer of stock, the declaration and payment of dividends.

Section 9 provides that the stock of the Company shall be deemed personal estate, and shall be transferable in such manner only, and subject to all such conditions and restrictions as by the letters patent, or by the by-laws of the company shall be prescribed.

Section 14.—"No share shall be transferable until all previous calls thereon have been fully paid."

Section 19.—"The company shall cause a book to be kept by the secretary or by some other officer specially charged with that duty, wherein shall be kept recorded (2) the names alphabetically arranged of all persons who are or have been shareholders; (3) the address and calling of every such person, while such shareholder; (4) the number of shares of stock held by each shareholder; (6) all transfers of stock in their order as presented to the company for entry, with the date and other particulars of each transfer and the date thereof."

Section 20.—"The directors may refuse to allow the entry into the book of the transfer, of any stock whereof the whole amount has not been paid." This provision is made in order that no transfer should prevent any antecedent creditor of the company from exercising his power against a party transferring, in the same manner as if he had not transferred; and nothing in that section should prevent the effect of Con. Stat. U. C. cap. 70, as regards stock sold under execution.

Section 21 provides that no transfer of stock shall, save for certain purposes, be valid until entry has been duly made in the books of the company.

Section 22.—Such books to be open during reasonable hours for inspection of shareholders and creditors of the company.

Section 23.—Books to be *prima facie* evidence in any suit against the company or shareholder.

Section 28 secures the stockholders from all liability beyond the amount of their share in the capital stock of the company.

The only ground on which the company or their officers justify their refusal to record the

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transfer of the stock to the party applying for the *mandamus*, is that by by-laws 29-30, no shareholder is permitted to transfer his stock or shares, or any of them, without the consent of the directors to such transfer being made, first obtained thereto; such consent being given by a resolution of the board of directors duly entered in the minute book.

By-law 30.—“And no such transfer shall be valid or of any effect, unless and until after such consent shall have been given the transferee or assignee, shall have accepted such transfer in writing in the transfer book of the company, and bound himself in writing to abide by and obey all the by-laws of the company, made or to be made, and to pay all calls upon the stock or shares so assigned to him or her.”

The question was not discussed before me, how far the directors had power to make such by-laws as being inconsistent with the provisions of the charter as to the assignable character of the stock.

Nor was any question of form as to jurisdiction raised on behalf of the company, but the simple, bald proposition was submitted, that under the Statute, charter, and by-laws, the company had a right to refuse to enter the applicant's name in the book as a stockholder; and also to refuse to enter the transfer of stock produced by him with the date and all other particulars in the book of the company as required.

In other words, they contend that under the by-law referred to, they may peremptorily refuse to consent to the transfer of any stock or shares in the company, without assigning or having any reason therefor, or at all events without assigning any reason if they have one.

I do not think they have any such power. If permitted to exercise such power, they would in effect prevent the transfer of shares which the Statute and charter clearly contemplates, and arbitrarily control the value of the property of the stockholders,

Some of the joint stock companies formed in England, have by-laws that the shares shall only be assignable to stockholders; and if a shareholder wishes to assign his stock, the company may purchase it, but if they cannot agree on its value the same must be settled by arbitration. I think the observations of the Master of the Rolls in the cases to which I have referred, lay down the rule which I am bound to follow in this matter—namely, that the power to refuse to

allow effect to be given to the transfer of stock, must be exercised by the directors of companies reasonably; and when no reason is assigned for the refusal that a *mandamus* ought to go to compel them to do what they ought to do. If a reason is assigned, and the parties complaining, think it insufficient, their course to test its sufficiency would be by instituting an action, either at law or in equity, to enforce their right and perhaps recover damages for the injury they have sustained. But when no reason is assigned, and the company advisedly abstain from assigning a reason for the refusal, then I think we may assume that they refuse to perform the duty which the charter and Act of Parliament has cast on them, and therefore that proceedings under the Statute of 35 Vict. may be resorted to.

Order accordingly.

SMITH V. THOMPSON.

Declaration—Abbreviation.

Held, that the use of the abbreviation “A.D.” instead of the words “in the year of our Lord,” in the dating of a declaration, is not sufficient ground for setting it aside.

[August 28, 1873.—*Mr. Dalton.*]

F. Osler shewed cause to a summons to set aside a declaration, on the ground that in the date the letters “A.D.” instead of the words “in the year of our Lord,” were used. The common practice was plain. In 6 Geo. II. cap. 14, it is enacted that abbreviations common in the English language can be employed in pleading. The use of these letters in mentioning a year in the Christian era was, perhaps, the most common abbreviation in the English language. *Morell v. Caspar et al.*, 1 Cham. R. 52, on which defendant relied should not now be regarded as law.

Mr Kew, (Read & Keefer) contra, cited C. L. P. Act sec. 77, and notes on that section in Harrison's C. L. P. Act, page 92, also *Morell v. Caspar, ante.*

MR. DALTON.—I think that the summons must be discharged with costs. The reasons upon which the old cases were decided do not apply here.

Summons discharged.

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WOODWARD v. CUMMINGS.

Ejectment—Married women—Practice.

Where a wife, living apart from her husband is in possession of land, under such circumstances as precludes the presumption of her being agent for her husband, she must be made a defendant in ejectment for the land.

[August 28, 1873.—*Mr. Dalton.*]

A summons was taken out to set aside a judgment in ejectment, and all proceedings thereunder, and allow the wife of the defendant to come in and defend.

The facts of the case as appeared by the affidavits filed were as follows : The defendant and his wife occupied the land in question as tenants of the plaintiff. After occupying the land for some time, they left at the plaintiff's request. After this there was a dispute between the husband and wife, and the wife went back to the land in question, which was then occupied, and took possession. She subsequently filed a bill for alimony against the husband, and obtained an interim order, the husband offering no defence. The plaintiff then issued a writ of ejectment against the husband for the land in question. There was no defence to this action, and the plaintiff obtained judgment, and placed a writ of *hab. fac. pos.* in the hands of the sheriff, who proceeded to execute it, whereupon the wife made the present application. She swore that up to the time of the execution of the *hab. fac. pos.*—she knew nothing of the action of ejectment, and was never served with a writ of summons in the cause.

Howell shewed cause. It is admitted by the wife herself, and by the attorney, that she has no title to the land. She is confessedly a trespasser, and therefore should not now be allowed to embarrass the plaintiff by coming in to defend the action. Even were she not a trespasser, she should have made the application before judgment. All the cases go to shew that an applicant such as the present must shew some title before being admitted to defend. The possession of the wife is the possession of the husband, and service on the husband of the summons is sufficient : *Mercer v. Bond*, 3 U. C. L. J. 150 ; *Croft v. Lumley*, 5 E. & B. 648, and *Harrington v. Harrington*, 3 U. C. L. J. 30.

F. Osler, contra. It is clearly irregular to serve the wrong party. The statute says that the party in possession shall be made a party to the action, but here the party in possession

was left out of the cause, and another party served instead. If this practice were allowed, a man could turn another man out of possession of land by serving a third party who was a stranger to the action. The English cases as to the possession of the wife being the possession of the husband cannot be regarded as authorities here, for by the late Ontario Statute a married woman can sue and be sued as a *feme sole*.

MR. DALTON.—The husband and wife were living apart,—were in litigation,—and the wife could in no respect be looked upon as the agent of the husband as to the land, or in any other respect. In addition to this the wife was the person in possession, of which the plaintiff was aware, and by the Ontario Act she could have been sued alone. The summons must be made absolute.

Order accordingly.

MCINTYRE v. FAIR.

Commission to examine witness in Province of Quebec.

Con. Stat. Can. cap. 79, secs. 4 *et seq.*, which authorizes the issue of subpoenas to the Province of Quebec, does not take away the power of the Court to examine witnesses there by commission.

[August 31, 1873.—*Mr. Dalton.*]

O'Brien moved absolute a summons for a commission to examine a witness on behalf of the plaintiff. The witness resided in the Province of Quebec.

J. B. Read shewed cause. The Court by the Con. Stat., Can., cap. 79, sec. 4, has power to issue a subpoena to the Province of Quebec, and such being the case, there is no necessity for a commission.

MR. DALTON.—The Consolidated Statutes of Canada, cap. 79, secs. 4, *et seq.*, which authorizes the issue of subpoenas to Quebec, does not take away the power of the Court to examine a witness in Quebec on commission : Con. Stat. U. C. cap. 32, sec. 19.

Order accordingly.

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ELLIOTT v. NORTHERN ASSURANCE CO.

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ELLIOTT v. NORTHERN ASSURANCE CO.

Costs—Demurrer books—Practice as to.

After issue joined in demurrer, but a month before term, plaintiff prepared demurrer books. The case was subsequently referred to arbitration. Costs of the pleadings, &c., to be costs in the cause.

Held, that the preparation by the plaintiff of the demurrer books was reasonable, and that he must be allowed costs of the same on taxation as part of the necessary proceedings in the cause before the reference.

[December 1, 1873.—*Wilson, J.*]

In this case the defendants had demurred to the plaintiff's replication. A few days after issue had been joined in fact and in law, the case was, by agreement of the parties, referred to arbitration, all the pleadings being withdrawn. By the order of reference, the costs of the pleadings so withdrawn were to be costs in the cause. By the terms of the award, the plaintiff became entitled to the costs of the pleadings withdrawn. The order of reference was dated the 16th of April, and the term following did not commence until the 19th of May. On taxation, the Master disallowed the costs of the demurrer books prepared by the plaintiff.

Against this decision *Delamere* for the plaintiff appealed.

Mr. Watson (Blake, Kerr & Boyd) shewed cause. The practice of the Courts has been to disallow the costs of demurrer books to either party, even though the costs were set down for argument, unless judgment had been actually given on the demurrer. In this case, so far from judgment having been given, the books were prepared more than a month before term. The costs were properly disallowed: Marshall on Costs, 34, 61, 66, and Harrison's C. L. P. Act, 418, as to costs of demurrer following judgment. The costs of demurrer are governed by the same rule as costs of discontinuance and costs of the day: Gray on Costs, 270; Marshall on Costs, 88 & 89; Harrison's C. L. P. Act, 323, where it is shewn that where there had been a countermand of notice of trial, the defendant was not entitled to any costs: *Irwin v. Meenaghan*, 3 Ir. L. R., 285. Either plaintiff or defendant could make up the demurrer books and set down the demurrer: Harrison's C. L. P. Act, 625. The plaintiff was premature in preparing the books so long before term. If the appeal was upheld, it would entirely reverse the practice of the Courts.

Delamere, contra. The books were made up *bona fide*; the costs were necessarily incurred by

the plaintiff, and should be taxed as costs in the cause. It was the duty of the attorney to avoid delay as much as possible. The amount involved in the case was large, and the pleadings were extensive, and it was the attorney's duty to prepare the demurrer books as soon as possible. Either party should be at liberty to prepare the demurrer books at any time after issue joined. Although the practice undoubtedly has hitherto been not to tax the costs of preparing for argument of demurrer in similar cases, yet it is a practice which should be remedied, as it worked great hardship upon suitors in the Courts.

WILSON, J.—The rule of the offices here, it is said, is not to allow the costs of making up the demurrer books unless the demurrer has been argued. That is not a reasonable practice, and must operate unjustly in many cases.

If, on the day for setting the books down, or on the morning of the day appointed for the argument, one of the parties proposed to settle the cause and to pay up costs, it would be quite unfair to make the successful party lose the costs of making up the books, of setting the case down for argument, of making up his brief, and the fee paid to counsel, all of which acts were necessarily, and in the due course of proceedings, properly done.

The attorney must be paid by some one for his acts and services; these certainly are not items properly chargeable between him and his client, and they are as clearly acts done in the ordinary course of the cause, and therefore constitute costs in the cause as between party and party. It is not easy to see how such a rule could have crept into our practice, but as it does not rest on any principle it should be corrected now that it is complained of.

The defendants in this case further contend that, as the books were made up about the middle of April for the term to begin on the 19th May, if the plaintiff be entitled to the costs of the books before argument, they were not warranted in making them up so long before the day when the case could be argued.

The plaintiff's attorney must not in any stage of the cause press forward too urgently the different proceedings. He would have no right before the time for appearance had expired to draw his declaration, nor to declare too hastily in any other case: *Wyllie v. Phillips*, 3 Bing. N. C. 776 nor to take any other step before the usual time for doing so.

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In England the rule is well established not to allow the costs of instructions for brief, or any of the other charges for preparing for trial before notice of trial served: *Freeman v. Springham*, 14 C. B. N. S. 197.

"Costs as between party and party are given by the law as an indemnity to the person entitled to them. They are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them :" per Bramwell, B., in *Harold v. Smith*, 5 H. & N. 381, 385.

The plaintiff here must be authorized to make up the paper books some reasonable time before they are to be set down for argument, and, at any rate, as long a time before the term as he has to make up his *nisi prius* record before the assize day, and to charge the costs of his proceeding to the adverse party if such adverse party were then to settle the cause.

It will be observed that the party not in default, in England, on delivering the paper books, may, the day after the default of the other party, deliver the books he should have delivered. It may be said, how can he do that when he cannot possibly know there will be a default, and yet neither party would be allowed the costs of delivering these additional books furnished by him if they were not delivered, upon the ground that it was necessary to prepare them beforehand in case it should become necessary to deliver them.

The like rule should be followed in preparing the demurrer books which applies to *nisi prius* records. Now records are not taxable against the opposite party if made up before issue joined and notice of trial given. But I do not suppose that the making up of the record must be postponed until the last day for giving notice of trial. If the notice of trial have been reasonably given before the last day for serving it, the *nisi prius* record then may be drawn, and it will properly be an item taxable between party and party.

So as to paper books, they may properly be got ready after issue joined and a reasonable time before the first day of term following the joinder of issue, and be allowed for between party and party, if the cause be settled after they have been made up, although the argument may not have been had.

I think it may be accepted as a proper practice that paper books made up after issue fully

joined, and a reasonable time before the first day of the term when the case may be argued, should be allowed in taxation between party and party, as a proceeding rightly taken in the due prosecution of the cause. The reasonable time when that may be done must, as in all cases, be a question for the discretion of the Master, according to the particular facts and circumstances.

Appeal allowed.

KORMANN v. TOOKEY.

Revision of taxation—Case settled—Practice.

The bill of costs in this cause having been taxed by the local Master, the plaintiff paid the amount taxed without protest.

Held, that he still was entitled to a revision of taxation before the Master at Toronto.

[December 15, 1873.—Master's Office, Q. B.]

In this case a verdict was recovered by the defendant. The bill of costs was taxed by the local Master, and afterwards paid by the plaintiff to a clerk of the defendant's attorney without protest of any kind. After this payment the plaintiff's attorney gave notice of revision. The revision was opposed on the ground that the costs having been paid without protest, the case was settled, and therefore was not in Court: *Bouchier v. Patton*, 3 U. C. L. J. 108. Also, that no judgment had been entered in the local office, and no allocatur made: Arch. Prac. 10th ed. 495. For the plaintiff it was contended that if the costs had not been paid by the plaintiff when he did pay them, the defendant might have signed judgment and issued execution, and thus have put the plaintiff to a considerable amount of extra expense. Payment of the bill as taxed by the local Master was the only way to prevent this being done. The memorandum made by the Master on the bill of costs amounted to an allocatur, and was sufficient to make it final.

THE MASTER decided that the case of *Bouchier v. Patton*, *ante*, as reported did not authorize him in refusing the revision. It decided that no case out of Court could be revised, and he could not decide that this case was put out of Court by payment of the bill. The notice of revision was given in reasonable time, and the revision must be proceeded with.

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BROWN v. DOLLARD.—BAIN v. McCONNELL.

[Chy. Cham.

CHANCERY CHAMBERS.

BROWN v. DOLLARD.

Jurisdiction of the Referee.

Under the circumstances of this case, the Referee was held to have no power to order a reference to a Master.

[August 25, 1873.—*Chancellor* on appeal from *Referee*.]

One Horkins filed a bill for the redemption of a mortgage, which bill was dismissed with costs. Horkins remained in possession, and some time afterwards the present suit was instituted to wind up a partnership. On 13th December, 1872, a motion was made in this suit for an order requiring Horkins to attorn to the Receiver appointed, and, by an order then made by the Referee, it was referred to the Master to ascertain whether Horkins held the property as a tenant, or was in possession as mortgagor, and still entitled to redeem. The Master found that he was entitled to redeem, and appointed a day for that purpose.

W. R. Mulock, for the administratrix of the mortgagee now moved to set aside the order of 13th December, 1872, on the ground, amongst others, that no notice of the application, upon which the order was made, had been given to the representatives of the mortgagee, who might have cause to shew against redemption.

Stephen Jarvis, contra, for Horkins.

Cattanach, for the plaintiff.

MR. HOLMESTED made an order referring the matter again to the Master, with liberty to the applicants to shew that Horkins was not entitled to redeem.

ascertain such a question, and the original order was also set aside for the same reason.

BAIN v. McCONNELL.

Dismissal for want of prosecution—Excuse for delay.

The pendency of another suit, which would give the relief desired, but in which no decree has been obtained, is not a sufficient answer to a motion to dismiss for want of prosecution.

[September 4, 1873.—*Referee*.]

J. H. Macdonald moved to dismiss for want of prosecution.

Bain, contra, for the plaintiff, to excuse the delay in prosecuting this suit, shewed that another suit was pending in which the plaintiff might obtain the relief he sought.

Macdonald, in reply, referred to *Guthrie v. Macdonald*, 3 Chy. Ch. 99.

MR. HOLMESTED thought that the excuse was insufficient, for until a decree in the other suit had been obtained, under which the plaintiff in this suit might come in, it was his duty to prosecute his own suit diligently. He therefore dismissed the bill with costs.

On appeal from this order,

THE CHANCELLOR set it aside, for the reason that it was not within the jurisdiction of the Referee to order a reference to a Master to

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McGILLIVRAY V. McCONKEY.—PATTERSON V. ROBB.

[Chy. Cham.]

McGILLIVRAY V. McCONKEY.

Dismissal for want of prosecution—Costs.

Upon a motion to dismiss where the only complaint is that the replication has not been filed within the time limited for so doing, and no sitting of the Court has been lost, the plaintiff may be put on terms to go down to a hearing at the next sittings at the place where the venue is laid but the defendant will not be awarded costs of the application, unless he has, by letter or otherwise, required the plaintiff's solicitor to proceed and file replication, and the latter has neglected to do so.

[September 4, 1873.—Referee.]

Howell moved to dismiss the bill for want of prosecution. Replication had not been filed within the month allowed after the filing of answer.

Ewart, contra. No hearing term has been lost, and no letter urging the plaintiff to proceed has been proved. It is the rule to require this in such cases as the present.

MR. HOLMESTED, holding as above, ordered that the plaintiff do proceed to a hearing at the next sittings at Barrie. Costs to be costs in the cause to the defendant.

PATTERSON V. ROBB.

Vendor and purchaser—Effect of purchaser's taking possession.

A purchaser at a sale under a decree of the Court, who enters into possession of the land purchased, even though he does so by leave of the parties to the suit, is deemed to have accepted the title unless the sanction of the Court has been obtained to his entering into possession without waiving his right to call for a good title.

[September 10, 1873.—Referee.]

This was a motion to compel a purchaser to pay his purchase money into Court. The sale took place in this cause on 26th April, 1873, and the purchaser bought the lands in question for the sum of \$1925. A tenth of the purchase money was payable at the sale, a fifteenth in one month thereafter, without interest, and the balance at the expiration of one year from the sale, with interest, to be secured by mortgage. On the 5th May, 1873, an order was obtained (the purchaser consenting) allowing the purchaser to pay the balance of his purchase money into Court at any time within three months from 26th April, and relieving him in that event from giving the

mortgage. The purchaser, it appeared, applied to the plaintiff's solicitor to investigate the title on his behalf, and the plaintiff's solicitor did so and expressed himself satisfied with it. The purchaser, however, did not appear to be satisfied with this investigation, and on 12th August, 1873, he employed another firm of solicitors to investigate the title for him. These gentlemen addressed a letter to the plaintiff's solicitor requiring to be furnished with an abstract of title, and an abstract was delivered to them by the plaintiff's solicitor on the 23rd of August. On the 27th August they delivered certain requisitions on the title to the plaintiff's solicitor, which requisitions it was alleged had not been answered. On the day these requisitions were delivered, notice of the present motion was served; but whether before or after the delivery of the requisitions did not appear.

The purchaser was in possession of the lands.

Bain, for the motion, cited Dart V. & P. 282; *Re Stewart*, 1 Chy. Ch. 243; *Mitcheltree v. Irwin*, 13 Gr. 537.

W. G. P. Cassels, contra, for the purchaser, resisted the motion on the ground that a good title had not yet been made out. He referred to *Crooks v. Street*, 1 Chy. Ch. 95; *O'Keefe v. Taylor*, 2 Gr. 95.

MR. HOLMESTED.—The purchaser, it seems, is in possession of the lands. He alleges that he entered in pursuance of an agreement with the plaintiff's solicitor. This agreement, however, the solicitor denies, and from the affidavits I do not think any such agreement is satisfactorily made out. But even if it had been, it would appear to be, after all, a matter of little consequence on the present application.

In Daniel's Pr. p. 1171, it is said: "If a purchaser enters into possession of the estate *without the sanction of the Court*, he will be considered to have accepted the title, and be compelled to pay the purchase money into Court at once, although he entered *with the permission of the parties* to the cause. The Court only can give such permission." In Sugden V. & P. p. 105, it is also laid down that "if a purchaser enters into possession, he will be compelled to pay the purchase money into Court, although he entered with the permission of the parties in the cause. The Court only can give such permission. If he obtain it improperly he may be compelled to take the title and pay the price at once." And the case of *Wilding v. Andrews*, 1 C. P. Coo. Temp.

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PATTERSON v. ROBB.—RE NOLAN.—CLARISS V. ELLIS.

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Cott. (1846-48) 380, cited, seems on all fours with the present, and appears to me to be a conclusive authority in favour of the present application. In sales under the decree of the Court it often happens that a great many persons are interested in the result, and it is obvious that some restriction must of necessity be placed on parties entering into arrangements with purchasers (which are not sanctioned by the Court) to the prejudice of the rights of others. It is not too much to say that if a purchaser obtain possession otherwise than according to the conditions of sale, he must either accept the title, or obtain the consent of the Court to his taking possession without waiving his right to object to the title. This permission may or may not be granted, according to the circumstances of the case. According to *Wilding v. Andrews*, it is never granted except upon the terms of bringing the purchase money into Court. At all events, it is certainly more proper that that question should be submitted to the Court, than that it should be left to be determined by one of the parties to the suit.

The purchaser in this case, by entering into possession as he has done, has accepted the title and must now pay the balance of his purchase money into Court, or give a mortgage to secure it in accordance with the original conditions of sale.

It was said that the subsequent delivery of the abstract, was a waiver by the vendors of their right to insist that the purchaser, by taking possession, had accepted the title. I think, however, the last clause of Mr. Bain's affidavit in reply, disposes of that objection, assuming it be entitled to any weight. He alleges that he informed the purchaser that any information he gave as to the title, subsequent to the 12th August, would be "without prejudice."

The purchaser must pay the balance into Court, or deliver the mortgage within one week; in default, a resale. The purchaser must pay the costs of this application.

Application granted.

RE NOLAN.

Married woman—36 Vict. c. 18, sec. 4—Jurisdiction of Referee.

Applications under 36 Vict. c. 18, sec. 4, (O,) for orders allowing married women to execute conveyances without their husbands' being also parties, should be made to a Judge in Chambers, not to the Referee.

[Sept. 11, 15, 1873.—*Referee.—Chancellor.*]

P. McGregor, moved, *ex parte*, under 36 Vict. c. 18, s. 4, for an order permitting a married woman to execute a deed of her property without her husband's being also a party, he being absent and his residence unknown.

MR. HOLMESTED, considering that the application should be made to a Judge, adjourned the motion before the Chancellor, who granted the order.

CLARISS V. ELLIS.

Con. Order 113—Decree nisi—Effect of proceeding under.

Proceedings under a decree which is not absolute are invalid.

The purchaser at a sale under such a decree was refused a vesting order, though he offered to waive all objections to the proceedings, it being considered that it was only the defendants who could waive this objection.

[October 1, 1873.—*Referee.*]

Two applications were made in this suit, one by the plaintiff for payment out of Court of the amount of the purchase money in Court on account of the plaintiff's claim; and the other by the purchaser for a vesting order, and for permission to apply part of his purchase money in discharge of certain executions.

The suit was brought by an execution creditor of Ann Ellis, to set aside a fraudulent conveyance of lands made by her to her co-defendant Fay, and for sale of the lands to satisfy the plaintiff's demand.

The bill had been taken *pro confesso* against both defendants, and on the 8th January, 1873, a decree was pronounced in accordance with the prayer of the plaintiff's bill. There was nothing in the decree itself to show that it was not absolute, but it appeared from an affidavit of Mr. Davis, the plaintiff's solicitor, that the defen-

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dants were both served with the bill by publication, and all subsequent proceedings were had and taken in their absence; and it was therefore clear that under Order 113, the decree was not absolute, but only a decree *nisi*.

W. R. Mulock, for the plaintiff.

N. W. Hoyles, for Mahoney, a purchaser.

MR. HOLMESTED.—Where a decree is not absolute, it should properly contain a clause to this effect:—"But this decree is subject to the provision contained in the Consolidated Orders 114, 115, 116, & 117, as to making absolute, decrees founded on bills taken *pro confesso*." (See Seton, page 1128, form 1.) I believe in this country it has not been customary to insert this very useful clause in decrees *nisi*, and its omission has doubtless been the cause of numerous irregularities, such as have arisen in the present case. The decree on its face appearing to be absolute, the Master to whom the cause is referred, has no means of knowing that it is merely a decree *nisi*, and he proceeds very naturally to act under it (as the Master has done in the present case) upon the false assumption that the decree is what it purports to be on its face.

By the omission of any intimation in decrees *nisi*, that they need to be made absolute, a plaintiff is practically enabled to proceed with a suit and to carry the decree of the Court into execution in a manner contrary to the practice of the Court and to the express provisions of the General Orders to which I have referred. These Orders are framed with a view to protect, as much as possible, from injustice, parties whose rights are adjudicated upon in their absence, but the object the Orders have in view is defeated, when, as in this case, the decree issues in such a form as to enable the plaintiff to carry it at once into execution without any notice to the defendant. And even assuming that a defendant would not be affected by such an irregularity on the part of the plaintiff, yet it is not difficult to see that his right to set aside the decree, might be embarrassed by conflicting rights and equities acquired by innocent persons under the decree, under the supposition that it was absolute.

I think there can be no doubt that where a decree is only *nisi*, no proceedings can properly be had under it until it has been made *absolute*. In *Castor v. Turner*, 1 R. & M. 311 a sale took place under a decree *nisi*, the

purchaser upon investigating the title, discovered that the decree had never been made absolute, and thereupon applied to be discharged from his purchase, which application was granted by V. C. Shadwell. From this order the plaintiff appealed to the Lord Chancellor, and pending the appeal, he procured the decree to be made absolute; but Lord Lyndhurst, before whom the case appears to have been twice argued, affirmed the order holding that the sale prior to the decree being made absolute, was invalid; and that the order of the Vice Chancellor being right at the time it was made, could not be reversed on the ground of the decree having been subsequently made absolute, even if that proceeding cured the defect in the title—upon which point, however, he expressed no opinion. Here, it is true, the purchaser makes no objection to the sale, but the irregularity is not one that the purchaser can waive. The defendants are the parties affected by it, and they are the only persons by whom the irregularity can be waived.

The defect in the plaintiff's proceedings in this suit, having been brought to the attention of the Court, it is impossible to grant the application which he now makes, for the payment out of Court of the moneys which have been paid in under the invalid sale; for that would enable him to get the benefit of his irregular proceedings.

The purchaser of one of the parcels has made a cross application for an order allowing him to apply part of his purchase money in discharge of certain executions which have been placed in defendant's hands against the defendant Ellis, *pendente lite*, and after the making of the Master's report, which found there were no encumbrances upon the land except the plaintiff's, and he also applied for a vesting order. But being of opinion that the sale is invalid, of course it is hardly necessary that I should consider this application. I may say, however, that even if the sale were not invalid, I do not think the purchaser's application should be granted. It appears the sale realized \$800. The only claim reported by the Master is the plaintiff's, amounting to \$390.05; a large balance therefore would remain, to which the defendants would be entitled. If there be any parties having any lien or claim upon this fund, it is preferable that they should come to the Court and establish their claim to it in due course, rather than that the purchaser should be left to pay off such claims on his own responsibility, and without reference to the defendants. The purchaser in such cases, upon paying his purchase money into Court, is entitled to

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CAMERON v. EAGER.—RE GILDERSLEEVE & WALKEM.

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a conveyance, and his title could not, I apprehend, be affected by execution creditors, *pendente lite*, for their rights upon the land are gone after the sale under the decree, and, if they have any claim, it is against the residue of the purchase money, to which the execution debtor would otherwise be entitled. I may also draw attention to the fact that the Master's report on sale, improperly omits to state "*the condition of sale as to payment of the purchase money,*" as required by Order 387 and schedule Q. This omission would necessitate a reference back to the Master, in order to supply this defect, as in its absence it is impossible for the accountant to certify that the purchaser has paid all his purchase money into Court, and without such a certificate, or an order dispensing with the payment, no vesting order could be granted.

Both the applications of the plaintiff and purchaser Mahoney, are refused. As the latter has made no objection to the validity of the sale, however, there will be no costs to either party.

Both applications refused.

CAMERON v. EAGER.

Abatement by bankruptcy of a sole plaintiff—Cost.

A motion by a defendant to dismiss after an abatement issued by the bankruptcy of a sole plaintiff and before revivor was refused; his proper course being to serve the assignee of the plaintiff in insolvency with notice to revive within a limited time.

[October 2, 1873.—*Referee.*]

This was a motion by defendant to dismiss the bill for want of prosecution. The sole plaintiff had made an assignment in insolvency before decree. The assignee in insolvency had not been served with notice of the application.

Bruce (*Edgar, Fenton & Ridout*), for the motion.

Arnoldi, contra, for the plaintiff. The insolvent objected that no order could be made, as the suit had abated: *Wood v. Surr*, 19 Beav. 555; *Bellamy v. Sabine*, 3 Jur. N. S. 943; *Wallbridge v. Martin*, 2 Chy. Ch. 275. He asked for the costs of the application.

MR. HOLMESTED.—I think that under the circumstances of this case the motion is irregular, and must be refused with costs. (See *Robinson*

v. *Norton*, 10 Beav. 484, and Daniel Pr. 63, and Daniel's Forms, No. 671). If the defendant desire to get rid of the suit, he must serve the plaintiff's assignee with notice of motion for an order that he do, within a time to be limited, take proper supplemental proceedings for the purpose of prosecuting the suit, and, in default, that the bill be dismissed.

Motion dismissed with costs.

RE GILDERSLEEVE & WALKEM, SOLICITORS.

Taxation of solicitor's bill after lapse of twelve months from delivery—Special circumstances.

On an application under C. S. U. C. c. 35, sec. 30, for taxation of a solicitor's bill, after the expiration of twelve months from its delivery, the special circumstances relied upon by the petitioner to entitle him to an order must be specified in the petition, and must be proved by proper evidence.

Where alleged overcharges constituted the special circumstances relied upon, and these were not specified in the petition, were not apparent by the production of the bill itself, and were not otherwise proved an order for taxation was refused with costs.

A payment within C. S. U. C. c. 35, sec. 42, means a payment of the whole amount, or some specific portion of the amount claimed to be due in respect of the bill of costs.

[October 6, 1873.—*Referee.*]

This was an application to tax a solicitor's bill, which had been rendered to the petitioner in October, 1869. The bill was for costs incurred in a suit of *Ferguson v. County of Frontenac*, and so far as appeared from the affidavit no further business had been done by the solicitors for the petitioner subsequent to the delivery of the bill in question, and for aught that appeared to the contrary, the relationship of solicitor and client then ceased between the parties. The petitioner was the sheriff of Frontenac, and from time to time, subsequent to the delivery of the bill of costs, he had rendered to the solicitors contra accounts for fees due from them to him, and the amount of three of these accounts had been credited by the solicitors to the petitioner, with his consent, on account of the amount claimed to be due from him at the foot of the bill of costs. A fourth account had been rendered, but its correctness being disputed by the solicitors, the amount of that account had not been ascertained or credited, but the solicitors stated that they were willing that it

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should be set off as soon as the proper amount had been ascertained.

C. W. Cooper, for the petitioner, relied upon the mode of payment, necessarily extending over some length of time, as an excuse for the delay in taking proceedings for taxation of the bills, and, with the same object, he read evidence to shew that negotiations for a taxation of the bill out of Court had been for some time pending.

As special circumstances which would entitle the petitioner to taxation, notwithstanding the lapse of time, he relied on various overcharges in the bill, and though these were not specifically pointed out by the petition, he cited *Re Brady*, 15 W. R. 632, as an authority to shew that that course was not essential.

He also referred to *Re Nicholson*, 3 De G. F. & J. 93, and *Re Cameron*, 2 Chy. Ch. 311.

C. Moss, contra, produced affidavits to shew that the only overtures made by the petitioner for a private taxation of the bill were not made till February, 1873, and were then distinctly repudiated by the solicitors. Items of overcharge he contended should be distinctly pointed out, in order that the solicitor might have an opportunity of explaining them if he could. See *Re Colquhoun*, 9 Beav. 146; *Re Bennett*, 8 Beav. 467; *Re Browne*, 1 De G. M. & G. 332, and *Re Thompson*, 2 Chy Ch. 100.

After a delay of twelve months, either pressure or gross overcharge amounting to fraud must be shewn to entitle a client to a taxation: *Re Strother*, 3 K. & J. 527.

MR. HOLMESTED.—The 42nd sec. C. S. U. C., c. 35, enacts that “The payment of any such bill as aforesaid shall in no case preclude the Court or Judge to whom application may be made from referring such bill for taxation, *if the application be made within twelve months after payment*, and if the special circumstances of the case, in the opinion of the Court or Judge, appear to require the same, upon the terms and subject to the directions which to the Court or Judge seem right.”

I do not think that the set-off of the contra accounts, which only amount to a partial payment of the bill of costs; can be deemed “a payment” such as is contemplated in this section. I think that must mean a payment of the whole of the amount claimed to be due in respect of the bill of costs, or at all events some specific

portion of it, and that a mere payment generally on account, such as, at the most, has taken place here, will not bring a case within the operation of the section.

No authority was cited to the contrary, and I have been unable to find any that would warrant any different construction of the Act to that which I have adopted.

Where a bill has been paid, the application for its taxation must, under sec. 42, be made *within twelve months after the payment*; but where no payment has taken place, the statute has assigned no limit for making the application, where special circumstances can be shown.

The present application therefore must be governed by section 30, which provides that “no such reference shall be directed upon application made by the party chargeable with such bill, after a verdict has been obtained or a writ of enquiry examined, *or after twelve months* from the time such bill was delivered, sent, or left as aforesaid, *except under special circumstances*, to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made.”

I have therefore to consider whether there are any special circumstances proved which entitle the petitioner to a taxation of the bill, notwithstanding the length of time which has elapsed since its delivery.

The special circumstances relied on by the petitioner in this case are, first, that the solicitors have charged for services which had in fact been rendered by the petitioner's former solicitor. This circumstance however, I may say, I consider is completely met by Mr. Walkem's affidavit. He states that the retainer by the petitioner took place on 2nd June, 1868 (the date at which the bill commences), although the order changing the solicitor did not issue till some time afterwards. Mr. Walkem speaks by reference to this docket, the petitioner merely speaks from recollection, and apparently fixes the date of the retainer, by the date of the order to change his solicitor. Mr. Walkem's application is moreover corroborated by the certificate of the Master, which is produced. If this matter could be considered a “special circumstance” I do not consider it proved.

Secondly, the existence of the contra accounts due from the solicitors to the petitioner is said to be a “special circumstance,” but I confess I am unable to see on what ground it can be so

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treated. The solicitors, instead of insisting, as they might have done, on the immediate taxation of their bill, have consented to its remaining unpaid until the petitioner should have earned sufficient fees to liquidate it by way of contra accounts ; and this indulgence on the part of the solicitors is now sought to be used against them as a special circumstance, but on what principle I am unable to understand.

A third ground, and this I think the one most strongly relied on by the petitioner, is the alleged existence of gross overcharges in the bill. The alleged overcharges are thus referred to in the petition and the affidavit filed in support. "That the said account so rendered contains, as I am advised and informed, and believe, overcharges and items of charge which are not taxable according to the tariff and practice of this Court." No items are specified, but the petitioner's solicitor contends that the bill itself may be looked at, and upon the argument he dwelt more particularly on the charges for attendances in the Master's office, which he said were very numerous, and had been charged for at \$1.50 per hour instead of \$1 per hour. He also stated, that objection is made to other items which have been noted in red ink in the margin of the bill ; but the nature of the objections was not stated, and I have no means of knowing what it is.

It was urged by the solicitor for the respondents, that where the petitioner relies on overcharges in the bill, as a special circumstance, the items objected to should be specifically pointed out in the petition and the affidavits filed in support of it, and the case of *Re Thompson*, 2 Chy. Ch. 100, and a number of others were cited in support of this proposition. *Re Bennett*, 8 Beav. 468, was an application for taxation after payment. In that case the Master of the Rolls said, "It has been decided that when you seek to have a taxation of a bill which has been paid, on the ground of overcharges, the specific items must be alleged in the petition and proved in evidence." And again, "Several cases have occurred before me on this subject, and one of the points settled is this, that where you want to open a settled bill you must state distinctly the items you complain of. Here there is a mere general statement of overcharges upon which every item of a bill of costs might, upon the hearing of the petition, be disputed ; the respondent would thus be placed in this difficulty, that before the petition was called he would have no opportunity of knowing what it was he was called upon to

answer." In that case the petition was dismissed with costs, but the bill itself having been brought before the Court, and items of overcharge pointed out by counsel on the argument, the Master of the Rolls concludes his judgment by saying, "Having regard to what appears in this bill of costs, I shall make this order without prejudice to any other petition the petitioners may be advised to present."

A similar order, under similar circumstances, was made in *Dunt v. Dunt, Re Colquhoun*, 9 Beav. 146.

In *Re Thompson*, Vice-Chancellor Mowat said, "The absence of any specification or proof of gross overcharge is fatal to the application," and he dismissed the petition with costs.

The petitioner's solicitor contended that *Re Brady*, 15 W. R. 632, had established a different rule, and that at all events it did not apply where the application is made before payment of the bill, although after the lapse of twelve months from its delivery.

I do not think, however, that *Re Brady* has established any different rule. On the contrary, I think it may be collected from that case that the Master of the Rolls did not proceed *solely* upon a view of the bill itself, but that the objections to the items complained of must have been distinctly pointed out in the affidavits, for in giving judgment he says, "On examination of the bill itself, it appears to me there are grounds arising upon the face of the bill, *coupled with the evidence* produced, which makes it proper that this bill should be taxed." And, from his observations as to the character of the letters objected to, it is evident some evidence must have been produced as to the impropriety of the charges therefor, beyond what appeared on the face of the bill.

In *Re Robinson*, L. R. 3 Ex. 4, however, the Court of Exchequer have held that on applications of this kind the bill itself may be looked at, and if *an unusual charge of a large amount*, requiring explanation to justify it, appear in the bill, that may be a circumstance sufficient to warrant the Court in referring the bill to taxation, even after the lapse of twelve months from its delivery.

The cases in equity, however, I think establish the rule that where it is necessary to show special circumstances to entitle the applicant to an order for taxation, and the special circumstance relied on is the existence of overcharges, the alleged overcharges must be specified

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in the petition, and, if not apparent by production of the bill itself, they must be proved by proper evidence; and I do not see that any different rule can prevail, whether the application be made under the 30th or 42nd section of the Act.

Here there is no specification of the items objected to, either in the petition or affidavit. The only evidence of the alleged overcharges is that furnished by the bill itself, and this is not sufficient.

But assuming for the moment that the petitioner may rely on what appears on the face of the bill, I think that even in that case, in the absence of all evidence to the contrary, it must be assumed that all the work charged for in the bill has actually been done, and the only question that could, in any event, be considered is whether the amounts charged are correct.

Now, with regard to the class of items more particularly objected to on the argument, I find, on examination of the bill, that for 154 hours' attendance there is an aggregate charge of \$219.50; admitting the respondents to be only entitled to \$1 per hour, this would appear to be an excessive charge of \$65. But it is not too much to assume, I think, that in conducting a special and important reference such as this appears to have been, some of the charges would properly be allowed as *special* attendances. In which case the apparent excess would be considerably reduced, and taking this into consideration, I cannot say that the bill itself shews that there is really any serious overcharges in respect of this class of items.

There are several other items objected to in the bill put in, but the nature of the objection is not apparent on the bill itself and is not supplied by affidavit; neither did the petitioner's solicitor on the argument attempt to explain in what respect they are open to objection. I think therefore the ground of overcharges is not made out.

There remains one more ground, and that is the alleged pendency of negotiations for a taxation of the bill out of Court.

No objection appears to have been made by the petitioner to the bill from October, 1869, until February in the present year. An application seems then to have been made to the solicitors for the first time to consent to a taxation, but Mr. Walkem, by his letter of the 5th February, 1873, distinctly informed Mr.

Kirkpatrick that he would not consent to a taxation, and Mr. Kirkpatrick states that he communicated the contents of this letter to the petitioner shortly after its receipt. For the delay which has taken place since February in making this application no explanation is offered.

In some cases it has been held that the continuance of the relationship of solicitor and client after the delivery of the bill is a special circumstance, so also the possession by the solicitor of the client's deeds and papers, and the refusal to deliver them up unless the bill be paid, and the fact of the client being in the power of the solicitor have also been held evidence of pressure, and, as such, circumstances justifying a taxation after payment; but nothing of the kind is shown on this application.

I am therefore of opinion, taking into consideration the fact that the bill had been received four years before any application has been made for its taxation, that no special circumstances have been proved to my satisfaction which would warrant my granting an order for its taxation. The application therefore must be refused with costs, including costs of attendance in Chambers on 15th October, without prejudice to the petitioner applying again if so advised.

Application refused.

HAMELYN v. WHITE.

Vacating order pro confesso—Delay—Defences allowed to be raised in an answer filed ex gratia.

An order *pro confesso* was vacated and a defendant allowed to file an answer, notwithstanding great and unexplained delay, no sitting of the Court having been lost thereby.

Defence amounting to a plea to the jurisdiction allowed to be set up.

[October 8, 27, 1873—*Referee—Strong, V. C.*]

This was an application to set aside an order *pro confesso* obtained against defendant White, and for leave to answer. The bill was served on 20th December, 1872. This defendant demurred to the bill, and after argument the demurrer was allowed, and leave given to plaintiff to amend. The bill was amended on the 9th April, and the amended bill was served on the defendant's

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solicitor on 30th April. The defendant was allowed the same time for answering as he would have been entitled to, had the amended bill been served on him personally at Montreal. This time expired on 11th June. Before the expiration of the time for answering, however, the defendant applied for, and obtained, an order extending the time until the 24th June. Having failed to put in his answer, the plaintiff obtained an order *pro confesso* against him on the 27th June, which order was served upon his solicitor on the 5th July last. The answer of another defendant was filed on the 18th September, 1873.

The defendant's solicitor, in his affidavit, made this statement in reference to the application for the further time to answer:—"I, on the 10th June last, made application to the Master of this Court, at L'Orignal, for one month's further time, within which to answer the said bill, and the Master, on that day, made an order by which the time was enlarged to the 24th June, 1873. My clerk, who made the application, did not inform me that the time had been limited to fourteen days, nor was I aware that such was the case until the plaintiff's solicitor served me with a copy of the order *pro confesso*." This was the only explanation offered of the omission to file the answer by the 24th June; and no explanation whatever was offered to account for the delay which had taken place from the 5th July to the 25th September. On the last mentioned day, the defendant's solicitor applied to the plaintiff's solicitor to be permitted to file the answer, notwithstanding the order *pro confesso*, but the plaintiff's solicitor refused to accede to this request, and on the 2nd October this motion was brought.

No hearing term had been lost by reason of the delay.

N. W. Hoyles, for the defendant White.

J. C. Hamilton, for the plaintiff.

MR. HOLMESTED.—The delay has been very great, and no sufficient excuse has been offered. It is however said that the plaintiff has not lost a hearing term, and that the defendant should be permitted to come in, notwithstanding his laches: *Ritchie v. Gilbert*, 3 Chy. Ch. 377. The venue is laid at L'Orignal, and the answer of the defendant Mulholland not having been filed until the 18th September last, it seems clear that even if the defendant White had filed his answer in time, the plaintiff would not have been in a

position to have brought his cause to a hearing this autumn. Under these circumstances I think the defendant may be let in to answer upon payment of costs. But I think the 5th paragraph, and paragraph 6 to the words "I have," in 4th line, and paragraph 13 of the proposed answer should be struck out of the answer to be filed. [In these paragraphs it was charged that the proper *forum* in which to obtain the relief sought by the plaintiff was before the County Judge, under the Insolvent Act.] These clauses are pleaded to the jurisdiction of the Court, and I do not think that that is a defence the defendant, after his great laches, should be permitted to raise now. See Lush's Pr. 447.

Against that part of the judgment of the Referee which ordered the above portions of the answer to be struck out, the defendant appealed.

Hoyles, for defendant, referred to *Stone v. Thomas*, L. R. 5 Chy. 219; *O'Reilly v. Rose*, 18 Gr. 33.

Hamilton, for plaintiff.

STRONG, V. C.—I do not think the defendant should be precluded from setting up the defence he here seeks to set up. Formerly at law interlocutory judgments used to be set aside and the defence of usurious consideration allowed to be raised. This was always considered a harsh plea; but a defence such as is here sought to be raised it is even exceedingly proper to allow to be raised; for if there really is no jurisdiction the parties cannot, even by consent, make one, and it would be the duty of the Judge to take the objection himself at the hearing, (if the want of jurisdiction then appeared) and to allow a supplemental answer, raising the defence, to be filed. The proposed answer may therefore be filed. No costs.

Appeal allowed; application granted.

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ABEL V. HILTS.

Motion for better affidavit on production—Notice required.

A motion for a better affidavit on production, as the alternative is that the party be committed upon failing to file the better affidavit, is substantially a motion to commit, and therefore requires four days' notice.

[October 21, 1873—Referee.]

J. S. Ewart moved, on the part of the plaintiff, for an order directing the defendants to file a better affidavit on production. The notice of motion read as follows:—"that the above named defendants Thos. Hilts and Geo. Hilts may be ordered forthwith to file a further and better affidavit on production of documents, on the ground that the said defendants have documents in their possession other than those mentioned in the affidavit on production already filed, and for such further or other order as to the said Referee may seem fit." The ordinary two days' notice had been given.

W. A. Foster for the defendants. The notice of motion here in effect asks that the defendants be ordered to file a better affidavit with the alternative that they be committed, and the motion therefore requires four days' notice. See *Broughall v. Hector*, 2 Chy. Ch. 434.

MR. HOLMESTED held that the objection was good, and the motion was enlarged for three days, on payment of costs of the day.

DEBLAQUIERE V. ARMSTRONG—ARMSTRONG V. DEEDES.

Consolidation of suits—Irregularity—Motion for leave to appeal—Reasonable grounds to be shewn.

By a decree made in *DeBlaquiere v. Armstrong* it was ordered that that suit be consolidated with the suit of *Armstrong v. Deedes*. One of the parties had a different solicitor in each suit. Held that subsequent proceedings must be carried on in *De Blaquiere v. Armstrong*, the suit in which the decree was made, and that the solicitor in that suit was the proper solicitor to be served with notice of further proceedings, and not the solicitor in the suit of *Armstrong v. Deedes*, the consolidation being held to operate as a stay of proceedings in that suit.

[October 25, 1873—Referee.]

This application was two-fold.

(1.) The plaintiff DeBlaquiere moved to strike this cause out of the list of causes set down to

be heard on further directions, on the ground that no proper notice of setting down had been served.

By the decree made in the cause of *DeBlaquiere v. Armstrong* it was ordered that this suit should be consolidated with a "certain other cause of *Armstrong v. Deedes* in this Court pending, wherein the said Robert Armstrong is plaintiff, and the said E. Deedes, A. A. Farmer, H. DeBlaquiere and Reginald O. Farmer are defendants."

The solicitors for DeBlaquiere in the suit of *DeBlaquiere v. Armstrong* were Messrs. Fitzgerald and Arnoldi, but notice of setting down had been served upon the agents of Mr. Nelles as the solicitor for DeBlaquiere. An affidavit of defendant Armstrong was filed in answer to the motion, stating that Mr. Nelles was solicitor for DeBlaquiere in the suit of *Armstrong v. Deedes*; and it was therefore contended by the defendant Armstrong that the service of the notice upon Mr. Nelles was sufficient.

(2.) The second branch of the application was for leave to appeal from the Master's report, notwithstanding its having been confirmed. To this application the objection was taken by the defendant that the affidavits did not show that these were reasonable grounds for appeal.

Arnoldi for the plaintiff.

Keefe for the defendant Armstrong.

MR. HOLMESTED.—Consolidation of actions is allowed at law, but in equity the usual mode of effecting that object is by directing all the proceedings to be carried on in one of the suits and by staying the other suit. See Smith's Pr. pp. 12, 886; Seton on Decrees, 889. I think in placing a construction on this decree, that is what I must assume it to mean, and from its wording it is clear that the suit of *DeBlaquiere v. Armstrong* is the suit in which proceedings are to be prosecuted and the other suit is the one intended to be stayed.

Having settled this question it becomes easy to dispose of the answer made by Armstrong's solicitor to this branch of the application. He files an affidavit from which it appears that Mr. Nelles was DeBlaquiere's solicitor in the suit of *Armstrong v. Deedes*, and he produces a notice of setting down served on Mr. Nelles agent, and he contends that that is sufficient service. It appears DeBlaquiere's solicitors in this suit are Messrs Fitzgerald and Arnoldi,

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and as that is the suit which is to be prosecuted, I hold that they are the only solicitors who could properly be served, and that therefore the service on Mr. Nelles is irregular, and in fact a nullity. The notice produced is moreover irregular on its face. It appears that the cause has been duly set down to be heard in Court, whereas the notice states that it has been set down to be heard in Chambers. There being no notice of hearing served, the cause must be struck out.

The plaintiff also applies to be allowed to appeal from the Master's report, notwithstanding its confirmation. In *Thomson v. Walker*, 1 Chy. Ch. 266, Vankoughnet, C. said, "I apprehend that where after consideration of a report, leave is asked to appeal, some reasonable ground must be shewn for doubting the decision of the Master at least, if not that he is wrong, and as I think it may be reasonably doubted whether the Master was correct in refusing to go into the state of affairs at the time of filing the bill, which I think may have influenced the Court in regard to the costs of the suit I will grant the application."

In *Romanes v. Herns*, 2 Chy. Ch. 363, the affidavit of the solicitor stated that the grounds on which the plaintiff desired to appeal, were set forth in an exhibit to his affidavit, and the defendant stated that he believed the grounds of appeal therein stated were reasonable and well founded, and it was held that this was sufficient.

In *Dickson v. Avery*, 3 Chy. Ch. 222, Strong, V. C., said "on a motion like the present, I am of opinion that it is necessary to shew a probable ground of appeal. I cannot subscribe to the rule laid down in *McQueen v. McQueen*, that it is only necessary to account for the delay. The judge should look at the facts and exercise his judgment in the case, not certainly as if he had to dispose of it, or finally decide it, but to the extent of ascertaining if there exists any reasonable or probable ground of appeal."

It is clear, therefore, I think, that the plaintiff on this application was bound not only to account for the delay, but also to show some probable ground of appeal. The delay has been satisfactorily accounted for, but it does not appear to me that any probable grounds of appeal have been shown. The notice of motion sets out certain grounds of appeal. These grounds amount shortly to this, that upon every question of fact submitted by the decree

to the Master, he should have found the reverse of what he has in fact found by his report. Mr. DeBlaquiere's affidavit thus refers to the grounds of appeal:—"The said report is against me, and had I known, or had any idea that the same had been made, I should most certainly have appealed therefrom within the proper time, and I am advised and believe I have a proper case for appealing, and I now desire to appeal therefrom." His solicitor says, "I verily believe that the said H. DeBlaquiere has a proper and good case for appeal from the said Report, and he is so advised by counsel." Neither affidavit refers to the grounds stated in the notice of motion, nor is there any affidavit filled, shewing that the plaintiff has any probable ground of appeal on the grounds therein stated.

On the argument the plaintiff's solicitor contended that it was the duty of the Referee to consider the evidence taken by the Master, and by a minute and critical examination of it, and performing the various calculations requisite in order to take the accounts directed by the decree, he was by this means to determine whether the plaintiff had any reasonable and probable grounds of appeal, but I do not think that is a convenient mode of procedure, or one that is warranted by the practice,—and I decline to adopt it.

Applications of this kind must be supported by an affidavit stating or referring to the grounds of the proposed appeal, and showing what are the reasonable and probable grounds for appealing on the grounds so stated. It is not enough to state a number of grounds in the notice of motion without filing any affidavit showing that there is reasonable and probable grounds for appealing on the grounds so stated, as it is obvious that the most ample grounds of appeal may be stated in a notice of motion, and yet there may not be in fact the slightest reason to warrant an appeal on any of them. As neither the plaintiff nor his solicitor have in their affidavits stated any reasonable or probable grounds of appeal, this part of the application must be refused, but under the circumstances I think it should be without prejudice to any further application the plaintiff may be advised to make.

The plaintiff succeeding in part, and failing in part of his application there will be no costs to either party.

From this decision the plaintiff appealed.

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Arnoldi for the plaintiff, urged as an additional ground for being allowed to appeal from the Report, the fact that no warrant to settle it had been issued by the Master.

Read, Q. C., contra, objected that this ground was not taken before the Referee.

STRONG, V. C.—Considered that although a sufficient *prima facie* case for an appeal might appear upon a consideration of the evidence taken before the Master, still the delay in applying had not been excused. He therefore dismissed the appeal with costs, the dismissal to be without prejudice to any application the plaintiff might be advised to make to discharge the report on the ground of irregularity.

BIGELOW v. BIGELOW.

Changing reference—Master having given an opinion in the case while in practice at the Bar.

A Master of the Court, while in practice at the Bar, had given an opinion upon the construction of a will, with a view to a settlement, at the request of the plaintiff in this suit, and both on behalf of the plaintiff himself and on behalf of all the other persons interested under the will. A settlement not having been arrived at, this suit was instituted for partition, and in the suit the construction of the will was declared by the Court, which construction was more favourable to the defendant J. B. than that contained in the opinion of the Master. The decree ordered a reference to the Master to make partition among the parties in proportions specified.

A motion was thereupon made by J. B. for the removal of the reference from before this Master, on account of his having given an opinion in the case as above stated. The application was opposed by all the other parties interested, except one, but was granted on the ground that the administration of justice should be above suspicion and should not be exposed even to groundless mistrust.

[November 10, 1873—*Chancellor.*]

Motion to change the reference under decree from Hamilton to Toronto or elsewhere.

The bill in this case was for partition. At the hearing it became necessary to place a construction upon the will of the testator, under which the parties claimed, and it was adjudged that one of the parties, Joab Bigelow, was entitled to a one-third share in the property in question, and also to a share with others in the share of a deceased sister; and it was referred to the Master at Hamilton to make partition, having regard

to improvements made by any of the parties, and some accounts were directed to be taken. Joab Bigelow was a party who had made improvements—he having erected a brick house on a portion of the premises. Before the institution of the suit, and before the appointment of the Master to his office of Master at Hamilton, his opinion had been obtained as to the construction of this same will by the plaintiff in this suit. This had been done, it was said, not on her own behalf only, but on behalf also of other parties interested, and not with a view to litigation, but with a view to a settlement.

Joab Bigelow now moved to change the reference from Hamilton to Toronto, or that it might be taken before Mr. Proudfoot, Q. C., of Hamilton. The Master himself was willing to take the reference.

A. G. M. Spragge, for the applicant Joab Bigelow, and Jonathan Bigelow.

C. Moss, for the plaintiff, and *D. Black* and *W. R. Mulock* for the other parties, in opposition to the motion. The Master has only given his opinion upon the construction of the will. This will had now been construed by the Court and the duties of the Master are purely ministerial. All that he has to do is to make partition of the property, following the directions given him by the decree. Any change of the reference will entail delay, and a change to Toronto will be attended with great increase of expense.

MR. HOLMESTED dismissed the application with costs, whereupon the applicants appealed to the Chancellor, who, on the 22nd November, delivered judgment as follows :

SPRAGGE, C.—The ground of this application is that the present Master at Hamilton was consulted by the plaintiff, as to the construction of the will upon which the decree of the Court has been made, and that he gave an opinion upon it; that opinion was less favourable to Joab Bigelow than what is decreed to him by the decree of the Court, inasmuch as while it agreed with the judgment of the Court as to his being entitled to one-third of the estate it negatived his right to any share in the share of his deceased sister. This application is opposed by all the other parties but one, (that one being Jonathan Bigelow) on the ground that a change of the reference to Toronto would be attended with a great increase of expense, and probably with delay; and that

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these objections apply to some extent to a reference to Mr. Proudfoot, as that learned gentleman's professional avocations might prevent his giving such continuous attention to the case as would be given to it by the Master, and it is urged that the duties of the Master upon this reference are purely ministerial.

I must treat the question thus raised between parties as a matter of principle, and I may say at the outset that I am perfectly satisfied that the learned Master would decide the matters referred to him as if he had never before heard of the questions upon which he gave his opinion. Those questions are indeed now settled by the decree, and the duty of the Master is clearly marked out for him by the decree. If therefore he ought not to take the reference it will be because of his having been consulted and given his opinion to one of the parties; not in reference to any matter referred to him, but upon the construction of the will with which upon this reference he will have nothing to do. I desire to state the case as strongly against this appellant as I think it can properly be stated, because in my judgment it is still proper that this reference should be withdrawn from the Master. The practice is familiar of gentlemen appointed to the bench declining to take any part judicially in suits in which they have been in any way concerned before their appointment; or in suits arising out of instruments upon the construction of which they have given an opinion. They do not so decline because they distrust themselves, but upon the well understood principle that the administration of justice should be above suspicion; that no jealously suspicious litigant should have room even to think that any judicial act on his case was due to a bias arising out of any connection of the Judge in any shape professionally with his case. It is not well that a Judge should be misjudged even without reason. This application itself shews how ready men are to believe in the existence of bias. It is almost certain that the party who makes this application would attribute a decision of the Master adversely to him upon any question between him and the plaintiff, to a bias in favour of his former client, and be dissatisfied with it; while he would have acquiesced in the same decision if given by any other judicial functionary. He would attribute the reason, wrongly no doubt; but it is desirable that there should be no room, nor even any pretence for the existence of such a feeling.

I have not referred to the case of a Judge adjudicating in a case in which he has an interest.

The rule in such case is perfectly clear. His judgment will be set aside, the only exception being where a failure of justice would be the consequence of his not sitting. In every other case his judgment would be set aside, however clear and convincing it may be that his judgment was uninfluenced by his interest. *Dimes v. The Grand Junction Canal*, 3 H. L. C. 759, was an instance of this; and *Boulton v. The Church Society*, 15 Gr. 450, was another instance in which the same rule was upheld and acted upon. In the latter case, the Judges who declined to sit certainly *felt* no bias in the case by reason of their interest, any more than did Lord Cottenham in the case in the House of Lords; and I am satisfied that no interest would be felt by the Master at Hamilton in taking the reference directed in this case; but a principle is involved in this question, and it would be unwise to narrow it or to fritter it away by overnice distinctions.

I do not agree that the duties of the Master upon this reference are purely ministerial. Evidence is to be taken before him, and a question of fact to be adjudicated upon; and he is to deal with some conflicting interests, in which, while I am satisfied there would be no partiality there would be room for the exercise of it. His duties are much more of a judicial character than are those of a commissioner for the taking of evidence, but the rule has been applied to commissioners in the English Courts. In one case, *Cooke v. Wilson*, 4 Madd. 380, the objection was that the commissioner had employed a clerk of a solicitor in the cause in taking, writing, transcribing and engrossing the depositions, and Sir John Leach suppressed the depositions. Two cases are referred to in that case where the defendant's depositions were suppressed because the solicitor of the defendant was one of the commission. In *Lord Mostyn v. Spencer*, 6 Beav. 135, one of the commissioners was a nephew and agent of the plaintiff. The nature of this agency did not appear, and the depositions were suppressed, although the witness had died since they were taken. In that case a passage from an old book of practice was cited, (Hinde, p. 304) which is particularly applicable in this case. "Commissioners ought to be indifferent persons; and after commissioners are struck, if it be discovered that one or more of the commissioners is or are nearly allied, of Counsel, Solicitor, Master or Partner with the plaintiff or defendant, or any apparent cause of partiality, or siding with any party can be shewn, the Court upon motion, or the Master of the Rolls upon petition, will

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order the opposite party to name commissioners *de novo*." If I should refuse this motion and leave the reference to be taken by the Master at Hamilton, I should not be acting in the spirit of the English decisions. I do not indeed find any case in which an objection has been made that a person designated to discharge some judicial, or *quasi* judicial function, has had relations with parties of the like nature with those which have existed here, or any relations that might—not that *would*—influence him, where the objection has not been sustained.

I do not at all agree in the observation that the withdrawal of this reference from the Master at Hamilton would be any, even the slightest imputation, upon his integrity. I think it should be withdrawn in order to the conservation of a principle, that ought to be held sacred, namely, that a man discharging judicial duties should stand perfectly indifferent between the parties, and should have stood in no relation to any party that can give room to the suspicion that his judgment may be biassed by such relation. In the case in the Lords, to which I have referred, Lord Campbell said, "no one can suppose that Lord Cottenham could be in the remotest degree influenced by the interest he had in this concern," yet the decree was set aside; so here while I do not for a moment suppose that the learned Master at Hamilton could be in the remotest degree influenced by the relation of counsel and client that existed between him and the plaintiff, it is in my judgment proper that the reference should be transferred to Mr. Proudfoot or some other gentleman at Hamilton, or its neighbourhood. Its transference to the Master here would, it appears, be attended with considerable additional expense and inconvenience.

As to costs. It is usual now to give the costs of a successful appeal as part of the costs of litigation; and I adjudge those costs to the appellant. I do not give him the costs of his motion before the Referee, because if the Referee had taken the same view of the question before him that I do, he should, I think, have properly granted the application without costs. The plaintiff had the decree directing the reference to the Master at Hamilton; a notice to change it was necessary, and the plaintiff should not, I think, be visited with costs for resisting the change, upon the grounds upon which it was resisted.

Appeal allowed and application granted.

QUANTZ v. SMELTZER.

Answer filed without authority.

Two defendants moved to set aside a notice of hearing and to strike the cause out of the hearing list, on the ground that the answer of a co-defendant had been filed without authority from him.

Held that the party whose name had been improperly used was the only person who could move to set aside the proceedings.

[November 15, 1873—Referee.]

The defendants Joseph and Mary Smeltzer applied to set aside the notice of hearing and to strike the cause out of the list of causes set down to be heard at the hearing term, at Toronto, on the ground that an answer had been filed for their co-defendant John Puterbaugh without his authority, and because he had never been served with the bill. In support of the application they read the affidavit of this defendant stating that he had never been served with a bill, and never authorized any one to put in an answer on his behalf.

H. Ferguson for Joseph and Mary Smeltzer. The defendant Puterbaugh will be entitled at any time to re-open the litigation; the applicants are entitled to have the hearing postponed until a decree can be made which will finally settle the matters in dispute.

McArthur, for Daniel Smeltzer.

MacLennan, Q. C., for the plaintiff. There is no authority for such a motion as this, unless it be made on the part of the defendant Puterbaugh. Until he moves, the proceedings must be considered regular.

MR. HOLMESTED.—No authority was cited warranting this application. It was urged, however, that the defendants moving had an interest in making this application, and that if they suffered the cause to proceed to a hearing after knowing of the alleged unauthorized proceeding they would be put to costs, and that any decree that might be made would not be binding on the defendant John Puterbaugh, and that they might be put to the necessity of litigating the whole matter over again. I think the defendants moving, are not likely to be prejudiced in the way they suggest. Having brought this matter to the knowledge of the defendant Puterbaugh I think there can be no doubt that unless he promptly moves to set aside the proceedings, he will be bound by them and could never again

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litigate the matters in question with these defendants. See *Wilson v. Wilson*, 1 Jac. & W. 457.

The party whose name has been improperly used seems to be the only party who can move to set aside the proceedings, and he makes no complaint.

The case of *Chisholm v. Sheldon*, 1 Gr. 294, has some analogy to the present case. There the defendant moved to compel the plaintiff's solicitor to produce his authority for using the name of a plaintiff added by amendment. The motion was refused with costs. In giving judgment the Chancellor said, "Parties whose names have been improperly employed have been allowed to move to be relieved from such unauthorized proceedings. Motions of even that character have not always prevailed. The tendency of both jurisdictions (*i. e.*, law and equity) is to hold such proceedings conclusive, leaving the parties to their remedy against the solicitor who has assumed to act. In this Court, so strong has been the tendency that motions of this sort have been ordered to stand over to the hearing, and no single case has been cited in which a solicitor has been called on to produce his authority at the instance of an adverse party. But assuming such a jurisdiction to exist, it assuredly can only be exercised upon a case of improper conduct, verified in the ordinary way. A solicitor discharges this as all other portions of his duty under heavy responsibility and until some improper conduct has been alleged the Court must intend that his duty has been honourably discharged. * * * Where the plaintiff resides within the jurisdiction an opportunity of communication is afforded where any impropriety is suspected, and by such communication the client is either bound by the acts of his attorney, or applies to be relieved in the ordinary way." In *McLean v. Grant*, 20 Gr. 76. Blake, V. C., said, "The Court takes for granted when a solicitor acts for a client in a suit that he has been duly instructed, and holds the proceedings conclusive, leaving the party to his remedy against the solicitor."

At the hearing of this motion I was satisfied that the present motion should be dismissed, and a reference to the cases I have mentioned confirms me in that opinion, and I think the motion should be refused with costs. See Sm. Pr. p. p. 279, *et seq.* By giving notice to the defendant John Puterbaugh, whose name is said to have been improperly used, the defendants now moving did all that was necessary to protect themselves from being prejudiced hereafter—and I do not think that if John Puterbaugh is content to

let the proceedings stand that these defendants have any right to complain.

Application refused.

The defendant whose name had been so used, subsequently moved to set aside the proceedings. The application was adjourned by the Referee before the Judge (Blake, V. C.), who was to hear the cause, and he a few days later, when the case came on, ordered it to be struck out of the hearing list with costs, to be paid by the plaintiff, with liberty to him to apply as against his solicitor for re-payment.

PAXTON v. DRYDEN.

Receiver—Distress.

An order had been made giving a Receiver liberty to distrain for arrears of rent. Upon the application of a tenant distrained upon for discharge of this order, it appeared that the tenancy had determined more than six months before the order to distrain was made, so that distress could not be made under 8 Anne c. 14 §§ 6 and 7. The order to distrain was therefore discharged.

No notice need be given to a tenant of an application for an order giving a Receiver leave to distrain.

[Nov. 22, Dec. 22, 1873—Referee.—*Blake V. C.*]

A Receiver had been appointed in this cause and an order was made in Chambers on Nov. 3, 1873, at the instance of the plaintiffs, empowering the Receiver to distrain for arrears of rent alleged to be due in respect of certain lands in question in this cause.

A tenant distrained upon under that order now applied upon petition to set aside the order for irregularity, because it was obtained without notice to him and before any proper notice of the appointment of a Receiver had been served upon him, or any order obtained requiring him to attorn, and before he had attorned.

The petition also prayed for the discharge of the order of Nov. 3rd, upon the meritorious ground that at the time the order was made there was no rent due which could be recovered by distress.

It appeared in evidence that the land of which the tenant was in possession was originally leased to one W. M. Jones by lease in

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writing, dated April 8, 1871; this lease contained a clause empowering the lessee at any time to put an end to the lease by giving six months' notice in writing to the lessees or any one of them, such notice to expire on April 8th, or Oct. 8th in any year. A notice under this clause had been served by the lessee, and the lease had been treated as having expired on April 8th, 1873.

W. A. Foster for the petitioner. The Receiver is not entitled to distrain, as he could not do so within the terms of 8 Anne c. 14 § 6. The order to distrain should therefore be discharged. He cited *Turner v. Barnes*, 2 B. & Sm. 435, 450; and C. S. U. C. c. 78 sec. 4.

A. Hoskin, contra, for the plaintiff.

A. J. Cattanach, for the Receiver.

MR. HOLMESTED.—I do not think that the applicant is entitled to succeed on account of the want of the preliminary notices. Where it is sought to attach a tenant for non attornery, or where the Receiver wishes to distrain in his own name, or to obtain a personal order to compel the tenant to pay his rent in arrear, such preliminary proceedings are necessary. But where the application is for leave to distrain I do not think there is any authority to be found for requiring the tenant to be served with notice of the application, and it is quite obvious that if it were necessary to give such notice the very object of the application would in ninety-nine cases out of a hundred be probably defeated by the tenant removing his goods before the application could be heard. On the other hand from the cases of *Pitt v. Snowdon*, 3 Atk. 750; *Shelby v. Pelham*, 1 Dick. 120; *Hughes v. Hughes*, 1 Ves. J. 161, it would appear that orders to distrain have been made without notice to the tenant.

The petitioner, however, applies to discharge the order on the merits, and on the evidence before me I am inclined to think he is entitled to succeed.

The evidence, I think, establishes that the lease under which the rent became due, which is sought to be distrained for, was put an end to in April last. The right to distrain is therefore governed by the provisions of the statute, 8 Anne c. 14, ss. 6, 7, and to entitle the lessor to distrain under that statute the distress must be made within six months after the termination of the lease, and during the occupancy of the tenant from whom the rent became due. It has

been held that the fact that a tenant overholds, does not, at common law, give the lessor a right to distrain for rent after the termination of the tenancy; *Williams v. Stiven*, 9 Q. B. 14; and see *Jenner v. Clegg*, 1 Moo. & Rob. 213; *Alford v. Vickery*, 1 C. & M. 280. So therefore in this case, the overholding of the tenant did not give the lessor a right to distrain after the six months allowed by the statute of Anne had expired.

The distress in this case therefore is too late, and as it is not shewn that there is any rent due for which a distress can properly be made, I think the order in question should be set aside, and the petitioner undertaking to bring no action against the Receiver, the plaintiff must pay the costs of the application, but without prejudice to any application he may be advised to make to be recouped out of the estate.

Application granted.

From this decision the plaintiff appealed. The appeal was heard by *BLAKE V. C.*, on the 22nd Dec. 1873, and dismissed with costs.

CAMPBELL V. CAMPBELL.

Interim alimony.

The question whether the plaintiff has been guilty of adultery cannot be raised on an application for interim alimony

[November 25, 1873—Referee.]

Motion for an order for interim alimony. The marriage of the plaintiff and defendant was admitted by the answer.

A. G. M. Spragge, for the plaintiff.

W. A. Foster, contra, asked for an enlargement for the purpose of shewing that the wife had been guilty of adultery, and was therefore not entitled to interim alimony. The ground upon which alimony was formerly awarded was that, according to the common law rules, the husband is seized of his wife's property, so that she, when living apart from him, had no means, and was therefore entitled to be supported by him: *Fletcher v. Fletcher*, 2 Sw. and Tr. 434. But now that our Legislature has, by a succession of enactments, given to a wife a separate control over her property, the old rules no longer apply, and

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interim alimony should not be granted as of course, but should be refused if it appears that the wife's conduct is such as to disentitle her to it; as if for instance she is shewn to be wantonly living in adultery apart from her husband.

MR. HOLMESTED considered that the reason for granting alimony was founded on the common law liability of the husband to support his wife, and that the recent legislation did not lessen that liability; and that interim alimony is granted by the Court in order that the plaintiff may not be deprived of this right to be supported by her husband (when she stands in need of it,) until it can be determined by judicial decision whether or not the husband is entitled to be relieved from that liability; that it had been repeatedly held, on applications for interim alimony, that the merits could not be gone into, and the recent legislation referred to, presented no sufficient reason for departing from that rule.

Enlargement refused. Usual order granted.

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Interim alimony.

The fact that the plaintiff has left the defendant and refuses to return to him, although he is willing to take her back to live with him, is no answer to an application for interim alimony.

[November 26, 1873—*Referee.*]

Motion for interim alimony. The marriage of plaintiff and defendant was admitted. It appeared from affidavits filed in answer to the motion that the plaintiff, who was a woman of great strength of mind, had left her husband, apprenticed her daughter contrary to her husband's wishes, and refused to return to him unless she received \$1,500, although he was willing to receive her.

W. G. P. Cassels for the plaintiff.

W. A. Foster for defendant. The plaintiff has by her conduct disentitled herself to receive interim alimony.

MR. HOLMESTED.—The investigation of the plaintiff's conduct must be reserved for the hearing. Such an issue as is here raised cannot be tried upon an interlocutory application like the present. Usual order granted.

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Repeal of Statute—No further proceedings to be had under Act repealed unless power expressly reserved.

36 Vict. c. 36, § 18, after repealing C. S. U. C. c. 69, and other acts, contained the following words:—"saving any rights, proceedings, or things legally had acquired or done under the said acts or any of them."

Held that these words preserved to rights, proceedings and things completely had acquired or done the efficacy which they had under the Act repealed; but did not continue the operation of the repealed Act, for the purpose of perfecting rights, proceedings or things not completely had, acquired or done.

Where there was a material error in a confirmation deed of lands sold with the sanction of the Court under C. S. U. C., c. 69, an application made after the repeal of that Act for an order authorizing the execution of a new deed was refused.

[November 29, 1873—*Referee.*]

This was a petition to authorize the trustees of the United Presbyterian Congregation of London to execute a confirmation deed of certain lands sold with the sanction of this Court in the year 1861, under the provisions of C. S. U. C. cap. 69. It appeared that the deed which was then executed, contained a misdescription of part of the lands intended to be conveyed, it being described as situate on the south instead of the north side of Bond Street.

J. S. Ewart for the petitioners.

MR. HOLMESTED.—The C. S. U. C. cap. 69, under which the deed was executed, having been repealed by the 36 Vict. c. 135, the question arises whether I have any power now to exercise any jurisdiction under the repealed Act. The 18th section of the repealing Act, after repealing the Consolidated Act and others, contains the words "saving any rights, proceedings, or things legally had acquired or done under the said Acts, or any of them." Under these words the petitioners contend that I have power to complete or make good what has been partially or defectively done under the former Act.

I think I have no such power. In *Trustees v. Ellison*, 9 B. & C. 752, Lord Tenterden said, "It has long been established that when an Act of Parliament is repealed it must be considered, (except as to provisions past and closed) as if it had never existed," and this dictum was approved in *Reg. v. Denton*, 18 Q. B. 761. In that case Lord Campbell said, "I think the effect of a repeal is the same whether the alteration affects

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procedure only, or matter which is more of substance." And Erle, J., in the same case says, "The repealed statute is with regard to any further operation as if it had never existed." See *Reg. v. Mawgan*, 8 A. & E. 496.

The words of the saving clause only apply "to rights, proceedings, or things legally had, acquired, or done," but there are no words here, I think, sufficient to preserve the continued operation of the repealed Acts for the purpose of completing thereunder proceedings which have been only partially or defectively done. If this purchaser of the lands in question has acquired any rights in the lands under the Acts in question they are no doubt protected. But if his title be incomplete this Court has no power to do anything further under the repealed statute in order to perfect it.

The application must therefore be refused.

WILSON v. BLACK.

Computation of time—Con. Orders 273 and 406—Motion to dismiss for want of prosecution—Production.

Replication was filed on the 9th of October. The Sittings of the Court were held on the 30th.

Held, that replication was filed "three weeks before the commencement of the sittings."

Semble. If the time when the plaintiff should join issue is not three weeks before the next hearing term at the place where the venue is laid, the defendant cannot succeed on a motion to dismiss, founded on the plaintiff's omitting to set the cause down for hearing at that term.

Delay on the part of the defendant in making production is no excuse for the non-prosecution of the suit by the plaintiff, where the plaintiff has delayed taking steps to compel production.

[Dec. 6, Dec. 17, 1873—Referee; Chancellor.]

This was a motion on the part of the defendant to dismiss the bill for want of prosecution. The bill was filed 13th November, 1872, and was amended on the 15th April, 1873. The answer of the defendant Thomas Black was filed on the 5th March, 1873. The answer of Wm. Black on 30th August, and the answer of Charles Mickle on 11th September. Replication was filed on 9th October, and since then no further proceedings had been taken. The sittings at Walkerston, where the venue was laid, were held on 30th October.

The plaintiff answered the motion by alleging (1) that negotiations for a settlement of the suit were going on for several months after the filing of the bill; (2) that difficulty was experienced in serving Mickle; and (3) that the defendant Mickle's affidavit on production was not filed till 24th October, and Wm. Black's affidavit on production was not filed till 1st November, five days and twelve days respectively after the time allowed by the order for production.

W. R. Mulock, for the motion, cited *Poole v. Poole*, 2 Ch. Ch. 475.

J. R. Strathy, for the plaintiff, besides excusing the delay on the plaintiff's part, contended that the replication was not filed three weeks before the last sittings commenced, and that therefore the plaintiff was not in default, and the defendant could not move to dismiss under Con. Order 273, clause 3.

MR. HOLMESTED.—I think the plaintiff has failed to make out any satisfactory excuse for not proceeding to a hearing at the last sittings of the Court. The alleged negotiations for a settlement may be some reason for the plaintiff's not having brought the cause to a hearing last spring, but none at all why he did not go to a hearing in October. Neither is the difficulty in serving Mickle any ground for the delay. He was in fact served and put in his answer in ample time to have enabled the plaintiff to proceed to a hearing had he been really anxious to prosecute the cause with effect. Neither is the delay in production any excuse. From the affidavit of the plaintiff's solicitor, it does not appear that the order to produce was served until the 9th and 11th of October, while it is apparent that the plaintiff was in a position to obtain and serve an order to produce as against all the defendants at least a month earlier. The delay in obtaining production appears to have been occasioned by the plaintiff's own laches.

But although I am of opinion that the plaintiff might have gone down to a hearing, the question remains whether he was bound to do so under the general orders. And upon consideration of the orders of the Court, I am driven to the conclusion that he was not. The last answer was filed on 11th September. By the Con. Order 273, cl. 1, the plaintiff had a month thereafter to file his application. Now the word "month," here means a *calendar* month, (see Order 7, cl. 12.) The replication filed on 9th

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October, therefore, was in time, and there was no default on the part of the plaintiff in that respect. Then clause 3, of Order 273, provides that if the plaintiff does not "set down the cause to be heard at the next sittings of the Court, at the place where the venue is laid, in case issue has been joined three weeks before the commencement of such sittings" the defendant may move to dismiss. In the present case issue was not joined three weeks *before* the sittings, (see Order 406.) I am therefore obliged to hold that although the plaintiff might have gone down to a hearing at the last sittings, he is not (upon a proper construction of the Orders) in default, for not doing so, and that therefore this motion must be refused. The costs must be costs in the cause to the plaintiff.

This judgment was appealed from.

J. A. Boyd, for the appeal.

Strathy, contra.

On the 17th December, the Chancellor gave judgment as follows:—

SPRAGGE C.—The appeal from the Referee in this case is upon his construction of clause three of Order 273 under the head of motion to dismiss, which runs thus: "If the plaintiff not having obtained an order to enlarge the time does not set down the cause to be heard at the next sittings of the Court at the place where venue is laid, in case issue has been joined three weeks before the commencement of such sittings." The venue was laid at Walkerton, and the sittings were appointed to commence on the 30th of October. The plaintiff had filed his report on the 9th of the same month. The question therefore is, whether issue was joined, in other words whether the replication was filed three weeks before the commencement of the sittings. The Referee in his judgment refers to Order 406, and I am told on the argument of this appeal, that he held it to apply to cl. 3, of Order 273.

Order 406 does not seem to me to apply. It certainly does not apply in terms. It settles the computation of time where an act is to be done, or a proceeding taken from or after a time limited, from any date or event, and its effect is to make both exclusive, the time not beginning to run till the day after the date or event from which it is to be computed, and the party hav-

ing to do the act or take the proceeding, having the whole of the day given by the order to obey it. It was passed to settle authoritatively the meaning of the words "from and after," which are in constant use in the proceedings of the Court, and it settled their meaning, in a way most favourable to the party directed or notified to do the act or take the proceeding. Cases to which this order does not apply must be tried by the ordinary rules of construction.

I have examined the well-known case of *Pugh v. The Duke of Leeds*, 2 Cwyp. 714, and several other cases. Some cases have been decided upon the words "clear days" or "so many days at the least" and where these words are used, their use has been held to take the case out of the general rule—the general rule being that one day is inclusive, and the other exclusive, as was held in *Rex v. The West Riding of Yorkshire*, 4 B. & Ad. 685; while in *Reg. v. The Justices of Shropshire*, 8 A. & E. 173, both days were held to be exclusive, a statute requiring notice of grounds of appeal from an order of justices to be given fourteen days *at least* before the Sessions. In the case in B. & Ad., a statute required ten days notice of an appeal to the sessions to be given.

In *Lister v. Garland* 15 Ves. 256, Sir William Grant adopted an observation of Mr. Serjeant Palmer, which is apposite to this case, viz: that where the act done from which the computation is made, is an act to which the party against whom the time runs is privy, it may well be made inclusive of the day on which it is made; and as he has unquestionably the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it, as a part of the time allowed him. This is quoted with approval by Mr. Justice Bayley in *Hardy v. Ryle*, 9 B & C. 608, as a distinction taken by Sir William Grant "that where the act done from which the computation is made is one to which the party against whom the time runs is privy, the day of the act done may reasonably be included, but where it is one to which he is a stranger it ought to be excluded." To apply this principle to the case before me the filing of the replication was not merely an act to which the plaintiff was privy, it was his own act; and the day on which that act was done may well be reckoned inclusively in the computation of time.

It seems to me, too, that taking the words of the order in their ordinary grammatical meaning we are led to the same conclusion. The

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time is to be computed back from the sittings not to a day, but to an act or event, the joining of issue in the cause. When did that act take place?—on the 9th of October. Then was that 9th of October three weeks before the 30th of October? Unless we take a fraction of a day or exclude the whole day, it certainly was. The act, the filing of the replication certainly was. It was one day before the 10th, therefore one week before the 16th, two weeks before the 23rd, and three weeks before the 30th, and that of course without counting the 30th. Or, counting back from the 30th, beginning at the 29th, we find that twenty-one days will bring us to the 9th. The present C. J. of Appeal computed in the same way in *Re Coe & Pickering*, 24 U. C. Q. B. 439 to which Mr. Boyd referred me. “If therefore,” he says, “the first publication was on Saturday, that week would expire on the following Friday.” My conclusion therefore is that upon a proper construction of the order, issue was joined three weeks before the commencement of the sittings.

I agree in the Referee’s observation that the delay in production of papers by the defendant is no answer to the application, arising as it did out of the plaintiff’s own delay in taking out orders to produce. The authorities referred to by Mr. Boyd upon this point, *Gillespie v. Gillespie*, 2 Chy. Ch. 267, and *Franco v. Meyer*, 2 H. & M. 42 support the opinion of the Referee. It is indeed difficult to resist the conclusion that the plaintiff desired to avoid carrying down his cause to a hearing at the late sittings at Walkerton, and that his object was so to manage the proceedings in the cause as to protract the case beyond those sittings. It does not appear to be, or to have been considered by the Referee to be, at all a case for indulgence to the plaintiff. From its nature, keeping the ownership of property in abeyance, it was a case proper for as early an adjudication as possible. The defendants evinced a desire for as early and inexpensive a disposal of the case as possible; the correspondence shews this, while the plaintiff seems to have adopted a policy of delay. Some points other than construction of the order to which I have given my attention were made by Mr. Boyd, but I have not thought it necessary to dispose of them.

The appeal is allowed, and with costs.

LOVELL v. GIBSON.

Examination of judgment debtor—Order for payment of costs a judgment—Consol. Stat. U. C., cap. 21, sec. 41—27-28 Vict., cap. 25.

An order had been obtained directing a defendant, Mrs. G., to pay to the plaintiff certain costs.

Held, that the order was a judgment and the defendant a judgment debtor within the meaning of Consol. Stat. U. C., cap. 21, sec. 41, as extended by 27-28 Vict., cap. 25, and an examination of the defendant touching her ability to pay the costs was allowed.

[December 22, 1873.—Referee—Chancellor.]

An order was made in this cause for payment by the defendant, Sarah Gibson, to the plaintiff of certain costs. An application was then made to the Referee in Chambers under Con. Stat. U. C. cap. 24, sec. 41, for an order that Mrs. Gibson should attend to be examined touching her ability to pay such costs. Con. Stat. U. C. cap. 44, sec. 41, enacted that “in case any party has obtained a judgment in any Court in Upper Canada, such party may obtain an order for the examination of the judgment debtor, orally, as to the property and means he has of discharging the debt.”

The words “in case any party has obtained a judgment in any Court in Upper Canada,” were, by 27-28 Vict. cap. 25, explained “to be taken to mean as well a party defendant as a party plaintiff, and to extend to all judgments, whatever the cause of action for which the same may be recovered.”

THE REFEREE granted the order for examination of Mrs. Gibson.

Hodgins, Q. C., for Mrs. Gibson, appealed from this order on the ground that the above statutes only allow an examination in the case of a judgment debt, and that an order for payment of costs was not a “judgment,” nor the party ordered to pay a “judgment debtor” within the meaning of the Acts. He cited *Re Hawkins*, 3 Prac. R. 239; *Hawkins v. Paterson*, 23 U. C. Q. B. 197; *Herr v. Douglass*, 4 Prac. R. 124; *Re Frankland*, L. R. 8 Q. B. 18.

Arnold, contra, cited *Hartley v. Shemwell*, 1 B. & Sm. 1.

SPRAGGE, C.—The principal question raised on this appeal is, whether the order directing the payment of costs is within sec. 41 of cap. 24 of the Con. Stat. U. C. passed in 1859, enlarged by cap. 25 of 27-28 Vict. passed in 1864.

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I incline to agree with the decisions in *Hawkins v. Paterson* 23 U. C. Q. B. 197, and in *Re Hawkins*, 3 Prac. R. 239, the substance of which is, that the words "any party" in the beginning of sec. 41 are restrained by what follows to any party who obtains judgment for a pre-existing debt or liability. 27-28 Vict. cap. 25, was passed to give a wide and more general effect to sec. 41 of the previous Act. It enacts that the words in that sec., "in case any party has obtained a judgment in any Court in Upper Canada," should, for all the purposes of the previous Act, "be taken to mean as well a party defendant as a party plaintiff, and to extend to all judgments whatever the cause of action for which the same may be recovered."

The previous Act provided, among other things, that no person should be liable to arrest for non-payment of costs (sec. 3), and it abolished the process of contempt for non-payment of any sum of money or of costs, under order of the Court of Chancery or of any of the Common Law Courts (sec. 13).

Sec. 15 enacted that every order of the Court of Chancery, or of the Common Law Courts, "directing the payment of money, or of costs, charges, or expenses, shall, so far as the same relates to such money, costs, charges, or expenses, be deemed a judgment; and the person to receive payment, a creditor; and the person to make payment, a debtor, within the meaning of this Act; and the said persons shall respectively have the same remedies . . . as in corresponding cases under this Act."

In order to carry out this section effectually and in the spirit, sec. 41 should have been made equally comprehensive, and it seems to me to be apparent that it is only by what may be called the accident of the phraseology employed that it is not so. Sec. 15 places a person entitled to receive costs in the position of a judgment creditor, whether he be plaintiff or defendant on the record, and this is carried out, or, at least, intended to be carried out, by the Act amending sec. 41, to which I have referred.

It is contended for the appellant that if such was the intention of the Act of 1864, it has failed of its intended effect: that it does not, at any rate, apply to this case; and *Herr v. Douglass*, 4 Prac. R. 124, before Mr. Justice Morrison in Chambers, is referred to. In that case the application was on behalf of a defendant in ejectment for the examination of a plaintiff on a judgment recovered against the latter for costs.

It was contended for the plaintiff that the Act of 1864 did not apply; and Mr. Justice Morrison said that he "did not think that the Act referred to had the effect contended for by the defendant, particularly in an action of ejectment, as this was," and he refused the application. This is all that appears upon the report of the case, so that I am not informed of the ground of the decision, unless it be that the costs in question were costs of a judgment in an action of ejectment.

Apart from *Herr v. Douglass*, my own opinion would be that the order of the Referee was right. The two Acts to which I have referred, being *in pari materia*, must be read together. Under sec. 15 of the earlier Act, the plaintiffs in this cause, having obtained against Mrs. Gibson an order for payment of costs, are, so far as relates to such costs, judgment creditors. The Act of 1864 applies the provisions of sec. 41 of the earlier Act, as well to a party defendant as a party plaintiff, and to all judgments for whatever cause of action recovered. The words "cause of action" is a piece of phraseology more applicable to proceeding at law than in this Court, but may be properly be read "cause of suit," having regard to the provisions of sec. 15 applying in terms to suits this Court. The words "cause of action" are obviously not intended to be words of restriction; but, it having been held that sec. 41 applied only to pre-existing debts and liabilities, its meaning was enlarged and the words "whatever the cause of action," were intended as I have read them, and, as I have no doubt, to be as comprehensive as possible.

I am not quite satisfied that, interpreting sec. 41 by sec. 15, the words debt or liability, and judgment recovered upon them, used in the latter section may not have been applied to the decree order and rules referred to in sec. 15; but I confess that this would have been a perhaps over-liberal construction of sec. 41. It at all events not necessary since the Act of 1864.

The provision in the Act of 1859, that no person should thereafter be liable to arrest for costs, is no reason why, where costs are adjudged against a party, he should not be examined upon oath as to his ability and means to pay them. The reason is the other way: one compulsory process being abolished, there is the more reason for making those that remain as effectual as possible; and I confess I see nothing in the fact that he would be liable to imprisonment if guilty

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of contumacy or of fraud, under the later provisions of the same section. If arrested and committed in such a case, it would not be an arrest for non-payment of costs, but for contumacy or fraud, or both, in seeking to defeat the remedy which the statute prescribed to the party to whom costs are adjudged.

I have not made any comment upon the provisions of the Common Law Procedure Act, to which I have been referred, inasmuch as they do not appear to me to be at all necessary in the case. *In Re Frankland*, L. R. [8] Q. B. 18, the application was under the garnishment proceedings of the Common Law Procedure Act, and it was held that they did not apply to an order for payment of costs, such order not being a judgment within the meaning of the Act; but it is clear that an order for payment of costs in this Court is a judgment within the meaning of the Act of 1859.

If this order is within that Act, as extended and enlarged by the Act of 1854, as, in my opinion, it is, I think it is a proper case for the examination of Mrs. Gibson. It does not appear to me to be an oppressive proceeding, but proper under the circumstances described in the affidavit.

Appeal dismissed with costs.

FITZPATRICK V. FITZPATRICK.

Conversion—Infants.

The principle of sec. 56 of Con. Stat. U. C. cap. 12, relating to the conversion of infants' estate sold under that Act, is also applicable to all cases where it is necessary for collateral purposes to effect a conversion of an infant's estate from realty into personalty; the rule of the Court in all such cases being, that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin and heirs-at-law of the infant are concerned. See *Ware v. Pollhill*, 11 Ves. 278.

before attaining his majority. The applicant, who was an elder sister, claimed to be entitled to the money in question under a will made by William Fitzpatrick, before the Wills Act of 1873, whereby he devised to her all his personal estate, and particularly his share of the fund in Court in this suit. She also claimed to be entitled to the money as being a creditor of her brother, having maintained and supported him for a number of years, supplied him with medicine, and disbursed moneys for his clothing and education.

MR. HOLMESTED.—I am of opinion that the applicant's claim cannot be maintained under the will of William Fitzpatrick.

The 56th sec.^t of the Chancery Act enacts: "That on any sale or other disposition so made, (i. e., of infant's estates,) the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain of the money at the decease of the infant, as they would have had in the estate sold or disposed of, if no sale or other disposition had been made thereof."

The sale in this case, it is true, did not take place under the provisions of the statute referred to. At the same time the statute lays down what I conceive was already the rule of this Court, in all cases where it is necessary for collateral purposes to effect a conversion of an infant's estate from realty into personal estate, viz., that the conversion shall not have any greater effect than is necessary for the accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin and heirs-at-law of the infant are concerned. See *Ware v. Pollhill*, 11 Ves. 278.

Although, at the time of the execution of the will of William Fitzpatrick, he had power to make a valid bequest of his personal estate, notwithstanding his infancy, he being above the age of fourteen; yet he had no power to make any devise of his real estate, and as the fund in question must, I think, be treated as realty in the eye of this Court, I am of opinion the will of William Fitzpatrick is inoperative so far as it attempts to dispose of the fund in Court.

This was an application by the plaintiff, Jane Fitzpatrick, for the payment out of Court to her, of the share of her co-plaintiff, William Fitzpatrick.

The money in Court was the proceeds of the sale of certain real estate in which William Fitzpatrick was interested; he being an infant, his share was retained in Court, and he died

The applicant, however, lays claim to the fund in question as a creditor of William, and from the affidavits filed in support of the petition, it appears that she maintained and

[January 14, 1874—Referee.]

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supported her late brother for a number of years, and supplied him with medicine and medical attendance, and also disbursed moneys for his clothing and education. In her affidavit, filed in support of her petition, she states that William Fitzpatrick came to live with her in 1865, under an agreement made by her with their guardian, William Rolston, whereby it was agreed that she should be paid for supporting him. Rolston, however, died in 1866, and she continued to support her brother for some years afterwards without any further agreement.

I think there can be little doubt that the applicant is entitled to be repaid what she has expended in the maintenance and education of William Fitzpatrick; it is an obligation which he himself appears to have recognized, and to discharge which he doubtless made the will which has been produced. At the same time, I think the petitioner is only entitled to be paid *pari passu*, with any other creditor of the deceased infant. There is no evidence at present before me as to whether there are any other creditors or not; if this evidence be forthcoming, and there appears to be no other creditor, I think the order may be granted for payment of the fund to the petitioner, she undertaking to abide by and perform any order which may be made for refunding the whole or any part of the money, in the event of any other creditor appearing to be entitled.

An advertisement was subsequently issued calling upon the creditors of William Fitzpatrick to prove their claims; none were proved under the advertisement, and the fund in Court was therefore paid out to the applicant, she giving the required undertaking.

DEWAR v. FOLLY.

Separate answer by married women—Con. Orders, 94, 95 and 96.

The case of service of a bill upon a married woman, after an order has been obtained directing her to answer the bill separately from her husband, is not within Orders 94, 95 and 96, which require a bill to be served within a certain time from its filing.

[January 26, 1874.—*Strong, V. C.*]

The bill in this case had been filed on 17th of August, 1872, and on 3rd of February, 1873, had

been served upon two defendants, a husband and wife.

The service upon the husband was allowed upon an application made on 7th of April, 1873; and on the 4th of September, 1873, an order was made for the wife to answer separately. On 23rd January, 1874, a motion was made in Chambers for an order *pro confesso* against the wife.

MR. HOLMESTED doubted whether Orders 94-96 did not apply, and whether the service of the bill had any validity, not having been effected till after the expiration of more than twenty weeks from the filing of the bill. He referred the application to a Judge.

—
26th of January, 1874.

J. A. Boyd, for the plaintiff.

STRONG, V. C., granted the order asked. He considered that the order of the 7th of April had cured the defective service, for the service upon the husband was also service on the wife, as he might answer on her behalf; and furthermore, that as the order of the 4th of September, in express words, directed service of the bill upon the wife, there was an additional reason for holding that Orders 94-96 did not apply to this case.

Order granted.

PAXTON v. JONES.

Examination of parties on affidavits on production—Con. Orders 138 and 268.

An affidavit on production is not within the provisions of Order 138 and therefore a party making one does not become liable to cross-examination upon it, except so far as this can be had by examination for discovery under Order 138.

Only one examination of a party under Order 138 can be had.

[January 28, 1873—*Referee.*]

This was a motion made by the plaintiffs for leave to cross-examine the defendants upon their affidavits on production, before the Special Examiner, the Master at Whitby being absent and therefore unable to take the examination.

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The plaintiffs had previously examined the defendants (other than C. W. Jones) for discovery, under the provisions of Con. Order 138; and before this examination had taken place these defendants had filed their affidavits on production.

W. R. Mulock for the plaintiff.

A. Hoskin for defendants.

MR. HOLMESTED.—The defendants contend that as the plaintiff has already, examined the defendants after answer, he cannot now be allowed to summon them again for any further examination, either under Order 138 or by way of cross-examination on their affidavits.

It was contended that the practice does not warrant the cross-examination of a deponent on any affidavit, except one that is to be used or shall be used, or any motion, petition, or other proceeding before the Court; and it was urged that an affidavit on production, is not within this category, and therefore no cross-examination can be had upon it under Order 268, which is the only order warranting cross-examination on affidavits.

This question is one that generally speaking is not of any great moment, because, whether a party can, strictly speaking, cross-examine his adversary on an affidavit on production or not, seems of little consequence to determine, seeing that the examination which he is entitled to make under Order 138 and the following orders affords him an opportunity of interrogating his adversary as to documents; and thus he gets all the benefit of a cross-examination on the affidavit, no matter by what name the examination may go by. But here the examination under Order 138, *et seq.*, having been already had by the plaintiff, it is very material to consider whether he have, as he contends, the double right to examine the defendants as he has done under Order 138, and also at a subsequent time to cross-examine them on their affidavits on production.

I do not think the plaintiff has this double right. Order 268 has been very strictly construed, and it has been held that where the proceeding for which an affidavit was filed has been disposed of, the right to cross-examine upon that affidavit no longer exists; *Catholic P. Co. v. Wyman*, 11 W. R. 399. So also in *Manby v. Lewicke*, 8 De G. M. & G. 470, it was expressly decided that under the analogous English Order,

a cross-examination on an affidavit on production could not be had.

So also depositions taken under Order 266, when there was no motion pending, have been held irregular, and were ordered to be suppressed; *Stovel v. Coles*, 3 Ch. Ch. 362.

These cases rather indicate that the right of examining witnesses or parties under these Orders is to be strictly confined within the limits which the Orders lay down, and that the Orders are not to be stretched to include cases which are not within those limits.

Now, the right to cross-examine on an affidavit on production, not being within the terms of Order 268, and there being no other order that would warrant a cross-examination on an affidavit except Order 138, which does so incidentally, (See Kerr on Discovery 56,) it becomes necessary to consider whether the plaintiff, having once examined the defendants under Order 138, can require them again to attend to be examined. I do not think he can. That Order was not intended to give a party a right to compel his adversary to submit to repeated examinations. The examination must be taken once for all; and if his adversary makes no default and answers all questions put to him, I do not think he can be required to submit a second time to examination, unless some very special and extraordinary reason exists for making such an application.

No such reason is shown to exist in this case. I think, therefore, the application, so far as it affects the defendants, other than C. W. Jones, must be refused. As the plaintiff succeeds as to C. W. Jones, and no extra costs appear to have been occasioned by the plaintiff's contention as to the other parties, the costs of the application will be costs in the cause to both parties.

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LONG v. LONG.

[Chy. Cham.

LONG v. LONG.

Sequestration—Con. Order 291.

To entitle a party to the issue of a writ of sequestration for non-payment of money, it is not necessary, since Con. Order 291, to shew that the order for payment and a demand thereunder have been personally served on the party ordered to pay.

Fisken v. Wride, 2 Chy. Ch. 212, and *Har. v. Meyers*, 2 Chy. Ch. 248, commented upon.

[January 30, 1874—Referee.]

Motion by the plaintiff for a writ of sequestration against the defendant for non-payment of interim alimony.

The order for interim alimony had been served on the defendant's solicitor, and admission of service given. A writ of *fit. fa.* had been placed in the sheriff's hands, and the sheriff stated that he was prepared to return it, *nulla bona*. The plaintiff also filed an affidavit stating that no sum whatever has been paid under the order for interim alimony.

A. Hoskin, for plaintiff.

W. Fitzgerald, for defendant.

MR. HOLMESTED.—Notice of this application has been served on the defendant's solicitor, and he resists the motion on two grounds; first, on the ground that when the plaintiff and defendant separated, the former took away with her property belonging to defendant to more than the value of the amount now due under the order for interim alimony; and, second, on the ground that it is not shown that the order for interim alimony has been personally served on defendant, and a demand made on him for payment of the amount alleged to be due.

With regard to the first ground, which amounts to a claim of set-off, I do not think I can go into that question now; to do so, would necessitate my going behind the order for interim alimony, and I do not think it would be proper for me to do that. At the time that order was made, it was open to the defendant to show that the plaintiff had the property in question in her hands, and that fact might very properly be taken into consideration in fixing the amount of the interim alimony to be paid by the defendant. Whether this question was raised by the defendant at that time I do not know; but, in any case, I think it cannot be raised now. In support of the second ground, the defendant

relied on the case of *Fisken v. Wride*, 2 Chy. Ch. 212. In that case the late Chancellor VanKoughnet held, under the Orders as they then stood, that before a sequestration could issue for non-payment of money, personal service of the order directing the payment and a demand for payment were necessary, and that even then the writ could not issue on *præcipe*, but that there must be an order made authorizing its issue. In *Harris v. Meyers*, in the same vol., p. 248, this rule was recognized, although in that case it was held that the defendant might, by acquiescence, waive these preliminary proceedings to the issue of the writ. *Fisken v. Wride* was decided in 1867, before the consolidation of the Orders, and consequently before the passing of Order 291. The Order then in force, which regulated the issue of writs of sequestration for non-payment of money was Order 46, s. 2, of June, 1853; and by that order it was provided that the writ of sequestration might issue when the sheriff returned *cepit corpus* to an attachment issued for contempt. By the C. S. U. C., cap. 24, s. 13, passed subsequently to this order, process of attachment for non-payment of money was abolished. In *Fisken v. Wride*, VanKoughnet, C., says: "The Legislature has abolished the process of contempt, but it has not declared that writs of sequestration shall issue as a matter of course; and I think that before one can issue, the order for the payment of money must be served and an affidavit thereof and of the non-compliance with it filed. I doubt if the registrar has any power now, in the absence of an order to that effect, to issue a writ upon *præcipe*. He was authorized, under the General Order, to issue a writ without further order, upon the return by the sheriff to the writ of attachment that he had the party in custody, but he has no authority that I see to issue the writ in any other case." The reason of this decision, however, does not appear any longer to exist, so far as the requirement of personal service of the order and demand for payment are concerned. Under the former practice, before an attachment could issue there must have been a personal service of the order, and Order 46, (1852), only authorized the issue of a sequestration after the writ of attachment had been executed, thus making the sequestration subsidiary to the process of contempt. But now, by Order 291, it is provided that, "if a party who is ordered to pay money, neglects to obey the order according to the exigency thereof, the party prosecuting the order may, at the expiration of the time limited for the performance thereof, apply in Chambers

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for a writ of sequestration against the defaulting party, and upon proof of due service of a notice, unless the Court thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue."

There is nothing in this order which requires personal service of the order sought to be enforced, or a personal demand of payment under it. That the defendant has neglected to obey the order in question according to the exigency thereof is quite clear, and I think this fact is practically admitted by him; at all events, he does not attempt to deny it. The issue of a sequestration is no longer subsidiary to process of contempt, and I think it was only by virtue of its being so, under the General Order formerly in force, that personal service was considered necessary. Personal service was formerly required in all cases where the defaulting party was intended to be put in contempt. But even that rule has latterly been in some cases relaxed; and, in order to obtain an attachment for non-production, either in the Master's office or in the office of the Clerk of Records and Writs, personal service is no longer necessary, either of the order to produce or of the notice of motion for the order for the attachment. See Con. Order 296.

This being the case, and there being nothing in the Order 291 requiring personal service or demand of payment as a preliminary step to the issuing of a sequestration, I do not think they are any longer necessary.

The application, therefore, must be granted, and the costs of the motion must be costs in the cause to the plaintiff.

MURCHESON v. DONOHOE.

Contempt—Married woman—Liability to attachment—35 Vict. 6 (O.) Sec. 9.

A married woman, a defendant, living with her husband, was ordered as administratrix of a former husband, to bring certain accounts into the Master's office in a suit in which her present husband was joined as a co-defendant.

On application to commit her for disobedience of the order, it was contended that the rule laid down in *Maughan v. Wilkes*, 1 Chy. Ch. 91, that the husband must answer for his wife's default unless he shews some ground of exemption was in effect abrogated by 35 Vict. c. 16, (O) which renders married women liable for their separate engagements in certain cases.

Held that, sec. 8 of this Act not being applicable to the present case, in which the marriage took place before the passing of the Act, the other sections did not alter the above rule.

It being shewn that the married woman was a woman of great force of character, and not *in fact* under the control of her husband:

Held that this was an insufficient reason for exempting the husband from attachment. To be discharged from this liability he must satisfy the Court that he has used his best endeavours to get his wife to obey the order.

[February 17, 1874—Referee.]

Motion by the plaintiff for an attachment against the defendant, Jane Donohoe, for contempt in not bringing her accounts into the Master's office pursuant to the Master's warrant in that behalf.

Mrs Donohoe was a married woman, and she was made a party to this suit as administratrix of a deceased husband, whose estate was being administered in this cause. Donald Murcheson, her former husband, died in November, 1862, and in May, 1863, letters of administration to his estate were granted to his widow, who subsequently, in January, 1871, intermarried with the defendant, Michael Donohoe.

C. Moss, for the plaintiff. Under the recent statute, 35 Vict., c. 16, s. 9. Mrs. Donohoe is liable to be sued or proceeded against separately from her husband, in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried. The claim which is sought to be enforced against her in this suit is a separate debt or tort, and therefore the rule on which the Court formerly acted of making the husband liable for the contempt of his wife (see *Maughan v. Wilkes*, 1 Chy. Ch. 91; *Ottway v. Wing*, 12 Sim., 90.) is no longer applicable. Moreover, the affidavits establish that Mrs. Donohoe is not in fact subject to the control of

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her husband, so that the reason on which the rule is supposed to rest does not exist in the present case.

MR. HOLMESTED.—The first question which it is necessary for me to consider is, whether the liability of this defendant as administratrix is a separate liability within the meaning of the statute, 35 Vict., c. 16., s. 9, and in order to arrive at a proper conclusion on that point it is needful to consider what was the state of the law before the passing of the Act in question.

At common law it would appear that if a *feme sole*, being an executrix or administratrix, wastes the goods of her testator or intestate and then marries, her husband is liable as long as the coverture lasts for the *devastavit*: Williams on Executors, 7th ed. p. 1837, and *Kings v. Hilton*, Cro. Car., 603 and other cases there cited. The C. S. U. C., cap. 73, appears to have made a material alteration of the law in that respect. The sections of that Act which seem to affect the question are the 14th, 15th, and 18th. The 14th section provides that every married woman *having separate property*, whether real or personal, not settled by any ante-nuptial contract, shall be liable upon any separate contract made or incurred by her before marriage, such marriage being since the 4th of May, 1859, to the extent and value of such separate property, in the same manner as if she were sole and unmarried.

The 15th section provides that every husband, who since the 4th of May, 1859, takes any interest in the separate, real, or personal estate of his wife, under any contract or settlement, on marriage, shall be liable upon the contracts made or debts incurred by her before her marriage to the extent or value of such interest only and no more.

Section 18 provides that in any action or proceeding at law or in equity, by or against a married woman, upon any contract made or debt incurred by her before her marriage, her husband shall be made a party, if residing within the Province, but if absent the action or proceedings may go on for or against her alone, and in the declaration, bill or statement of the cause of action, it must be alleged that such cause of action accrued before marriage, and also that such married woman has separate estate; and the judgment or decree, if against such married woman, shall be to recover of her separate estate only, unless the husband shall have pleaded any false plea, in which case he is to be personally liable for the costs occasioned thereby.

The effect of this enactment seems to be simply this, that when a woman marries after the 4th of May, 1859, neither she nor her husband are liable in respect of debts contracted by her before marriage, beyond the amount of her *separate property*, if any, and if she have no separate property, then it would seem to be the intention of the Act that neither of them should be liable during coverture. Although it is true the husband's exemption from liability is limited by the condition that he takes some interest in his wife's separate, real or personal estate, yet it could only be held by a forced and technical reading of the Act that his liability was intended to be greater where his wife had no separate property at all than where she had some.

This appears to have been the state of the law at the time of the passing of 35 Vict., c. 16, on the 2nd of March, 1872. It is said that this Act has extended the liability of this defendant Janet Donohoe, but I am unable to see that it has. In the first place, it is to be borne in mind that up to the passing of the Act, the law had not exempted the husband from all liability for the debts of the wife, contracted by her before marriage, it had only limited that liability to the extent of the separate property of the wife. By section 8, it is provided that a husband shall not by reason of any marriage which shall take place after this Act has come into operation be liable for the debts of his wife, contracted before marriage, but the wife shall be liable to be sued therefor, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had remained unmarried. This section, however, has no application to the present case, because the marriage of Mrs. Donohoe to her present husband took place before the passing of the Act.

Section 9 provides that any married woman may be sued or proceeded against separately from her husband, in respect of any of her separate debts, engagements or contracts or torts as if she were unmarried.

This section must be read, I think, in connection with section 8, and it is only to the debts of a wife, contracted before marriage, or in respect to a separate business carried on by her, which are within that section, that the provisions of section 9 extends. If this is a correct conclusion, (and the solicitor who instituted this suit seems to have been of that opinion, for he has joined the husband as a defendant,) then this case is not within the meaning of section 9.

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The other ground relied on is, that the evidence shows this woman to be what is known colloquially as "a strong minded woman," and not under the influence or control of her husband. I think, however, that the case cannot be excepted from the ordinary rule upon any such ground, the law presumes that the wife is subject, as she ought to be, to her husband's control, and it is for the husband to satisfy the Court that he has used his best endeavours to get his wife to obey the order of the Court before he will be discharged from the liabilities which the law imposes on him.

I think this case is governed by that of *Maughan v. Wilkes*, 1 Chy. Ch., 91, and the present application must, therefore, be refused.

As to the plaintiff's remedy I would refer to the case of *Hope v. Carnegie*, L. R. 7 Eq. 254, S. C. L. R. 4 Chy. 264.

Application refused.

LINDSAY PETROLEUM CO. V. PARDEE.

Motion to dismiss—Production by a corporation.

The prosecution of a suit was, upon the advice of counsel, delayed, pending an appeal to the Privy Council in a suit previously instituted, upon the result of which appeal the second suit depended.

Held on a motion to dismiss for want of prosecution, that under the peculiar circumstances of the case, the excuse for not proceeding with the suit was sufficient.

Mode of procedure to obtain discovery of documents from a corporation, considered.

[February 6, 1874—*Referee*. February 9, 1874—*Chancellor*.]

Motion by defendants to dismiss for want of prosecution and for non-production.

The plaintiffs in this suit sought to set aside a sale of certain lands, made under execution, under somewhat peculiar circumstances. The plaintiffs, in the year 1866, contracted for the purchase of certain lands, which were duly conveyed to them. They subsequently discovered that a fraud had been practised upon them in the matter of the purchase, and in January, 1866, they filed a bill against the defendants, Farewell, Kemp and others, to set aside the purchase and to obtain repayment of the purchase money, offering to re-convey the lands to the vendors. A decree was pronounced in that suit rescind-

ing the purchase and ordering the defendants to refund \$13,750, with interest, being the amount of the purchase money, and upon such repayment the plaintiffs were ordered to execute a reconveyance of the lands to the defendants in that suit. The decree was re-heard and affirmed, and the defendants thereupon appealed to the Court of Error and Appeal, in which Court the decree was varied in so far as it directed the contract to be rescinded, and the defendants in that suit were ordered to refund \$3,750 to the plaintiffs, as the difference between the price at which they had sold the lands to the plaintiffs, and their actual value. From this judgment of the Court of Error and Appeal the plaintiffs appealed to the Privy Council, and, pending the appeal, and in order to deprive the plaintiffs of the power of re-conveying the lands in question, in the event of their succeeding in that appeal, it was alleged that the defendant Farewell (the party entitled to the reconveyance of the lands, in the event of the original decree of this Court being upheld,) procured the lands in question to be sold under an execution, and at said sale procured the defendant, Pardee, to buy the lands in as trustee for him, the defendant Farewell, for the sum of \$321.96. It was to set aside this sale that the present suit was brought. The original bill was filed on 23d November, 1871, to this a demurrer was filed on 26th January, 1872, and subsequently the plaintiffs filed an amended bill under an order made on 5th March, 1872, the demurrs having been submitted to without argument. On the 23d August, 1872, the defendants filed their answer, and on 31st March, 1873, the replication was filed, and the defendants were examined. From that time to the time of this motion, the plaintiffs had suspended further proceedings in this suit, awaiting the result of the appeal to the Privy Council in the other suit, and this they had done upon the advice of counsel.

G. M. Rae, for the defendants.

H. Cameron, Q. C., for the plaintiffs.

MR. HOLMESTED.—The defendants move to dismiss the bill, both for want of prosecution and for non-production, pursuant to an order to produce, served upon the plaintiffs. I do not think, under the peculiar circumstances of this case, that the bill should be dismissed for want of prosecution. On a motion of this kind I think I should be satisfied that the plaintiff has been unreasonably or vexatiously delaying the prosecution of their suit; the pendency of another

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suit, in which the plaintiff may possibly obtain relief is, as a general rule, no answer to a motion to dismiss, because, in general, the plaintiffs can have no guarantee that that other suit will be prosecuted with effect : *Guthrie v. McDonald*, 3 Chy. Ch. 99; *Bain v. McConnell*, ante p. 113. In this case, however, the plaintiffs are actors in both suits ; they have as a matter of fact prosecuted the other suit with effect, and having regard to the nature of the relief sought in this suit, and seeing that its efficacy is so entirely dependent on the result of the appeal to the Privy Council, I am unable to say that the plaintiffs in delaying to bring their cause to a hearing have acted unreasonably or vexatiously. Had the defendants desired to force this suit to a hearing, they might have done so, probably, by making an application of this kind earlier, but there is no evidence before me that they ever desired the plaintiffs to proceed, and, although they were not under any obligation to do so, I think that is nevertheless a circumstance I should take into consideration, under the peculiar circumstances under which the delay has taken place.

In regard to the non-production of documents under Order 144, the defendant is entitled to move to dismiss the bill, where the plaintiff neglects to obey an order for production. No objection was taken by the plaintiff's solicitor to the regularity of the order for production, supposing any such objection to be open to him. The order to produce is the common order of course, and in answer to it the plaintiff filed an affidavit made by the Vice-President of the Company, in which he states that the only documents in his possession are the pleadings, proceedings &c., in the suit of *Lindsay Petroleum Co. v. Hurd*. He does not speak as to the possession of the company, nor does he specify or refer in any way to the books of account of the company. On his examination he stated that he believed the secretary had the company's books, but that he had not seen the secretary, nor called upon him to produce them. It is on this evidence that the defendants contend there has been a neglect to obey the order to produce. Under the former practice it was always necessary in suits against a corporation to join any officer of the corporation from whom discovery was sought as a party defendant, and this is still the practice in England. Where the company were the plaintiffs, and the defendant desired a discovery of documents, he had to file a cross bill, making the officer from whom discovery was sought a party. The practice in this Court, however, has been changed, and Orders 63 and 64 provide that officers of companies are no longer to be made parties for

discovery only, but that whenever a company is a party plaintiff or defendant, the adverse party desiring discovery is to be at liberty to examine any officer of the company, who by former practice might have been made a party for the purpose of discovery. This, therefore, is the procedure which, under the General Orders, is now provided for obtaining a discovery of documents from a corporation. The defendants are at liberty to examine the secretary and discover from him whether the company have, in fact, any documents which have not been discovered and produced by Brown; at present that fact is not so clear that I can say the plaintiffs have disobeyed the order for production served upon them. The defendant's solicitor contended that under the common order the plaintiffs were bound to file the affidavit of their secretary, but I do not think they were bound to do so. Upon a special application, an order might be made, as was done in *Ranger v. G. W. R. Co.*, 4 DeG. & J., and in *Republic of Liberia v. Imperial Bank*, L. R., 16 Eq. 179, requiring the plaintiffs to file an affidavit to be made by one of their officers, unless they should satisfy the Court by sufficient evidence that they were unable to obtain such affidavit to be made. In the case of *Ranger v. G. W. R. Co.*, the defendants appealed from an order in the common form, requiring them to produce upon oath, and it was varied on appeal in the way I have mentioned. It is quite obvious that the order to produce in the common form is not in terms applicable to corporations, if we are to understand the term "on oath" to mean the oath of the party required to produce, a corporation being unable to make oath. I am, therefore, of opinion the plaintiffs' omission to file the affidavit of the secretary was not any disobedience of the order. The defendants can obtain a discovery of documents by examining the secretary under Order 64, and it will then be seen whether the documents produced by the plaintiffs are all the documents in their possession, or not; until that is done I am not in a position to say whether the plaintiffs have disobeyed the order as alleged.

The motion to dismiss, therefore, must be refused. The plaintiffs, however, must undertake to proceed to a hearing at the next sittings. In the event of their doing so the costs of this motion will be costs in the cause to both parties. In case, however, they make default, the bill must be dismissed with costs, including the costs of this application.

This order being appealed from, it was on February 9th, 1874, affirmed by SPRAGGE C.

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LEONARD v. CLYDESDALE.

[Chy. Cham.]

LEONARD v. CLYDESDALE.

Representative to a deceased party—Con. Order 56.

An application under Con. Order 56, for the appointment of a person to represent the estate of a deceased party was refused where it was ~~con-~~ ceded that the deceased could not be said to be "interested in the matters in question in the suit," or that the personal representative if appointed would be merely a formal party.

[March 2, 1874.—Referee.]

The bill in this suit was filed against Mrs. Clydesdale, as executrix *de son tort*, charging that she had sold the personal estate of her late husband John Leonard, and applied the proceeds in the purchase of certain lands; and praying that she be declared a trustee of the lands for the plaintiffs, as the only children and next of kin of John Leonard, and that if necessary, that the estate of John Leonard be administered under the direction of the Court.

This application was made by the plaintiff under Con. Order 56, for the appointment of some person to represent the estate of the deceased John Leonard in the suit on the ground that there was no personal estate outstanding, and that the appointment would save expense.

R. M. Wells, for the plaintiff.

W. Fitzgerald, for the defendants.

MR. HOLMESTED.—This case is not within the letter of Order 56, and I do not think it is within the spirit of it either. That Order provides that "where in any suit or other proceeding it is made to appear that a deceased person who was interested in the matters in question, has no legal representative, the Court may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceeding, &c."

The Order makes provision therefore for the representation of the estate of a deceased person who was interested in the matters in question in the suit in which such representation is sought.

I do not see how it can be said that John Leonard was ever in any way *interested in the matters in question in this suit*. I think it is clear therefore that the order does not, in terms, extend to such a case as the present. The ground upon which the application is based is the alleged saving of expense, and because it is alleged that there is no personal estate remain-

ing outstanding. This however is begging the question, and until the accounts have been taken it is hardly safe to assume that the personal estate has been consumed. I see by Mrs. Clydesdale's answer that she admits that the deceased left \$1,400 worth of personal property; this, she says (with the exception of \$150 laid out in the purchase of the land in question) was expended in the support of the plaintiffs. It has been held that where the object of the suit is to administer the estate of the deceased person, an order will not be made for the representation of the estate under the provisions of Order 56: *Silver v. Stein*, 1 Drew, 295, and other cases noted in Taylor's Orders, 148.

In the recent case of *Re Tobin, Cook v. Tobin* (*ante p. 40*), however, Blake, V. C., made an order for the solicitor of the deceased administratrix to represent the estate, which was being administered in that suit. In that case, however, the estate had been fully administered and appeared to be insolvent, and all that remained to be done when the administratrix died, was to issue the Master's report. There his Lordship thought the further representation of the estate before the Court was purely formal, and he made the order asked. Here, however, the state of the accounts is unknown. If the plaintiff's contention be right a considerable sum may be found due from Mrs. Clydesdale, which would be properly payable to the administrator of John Leonard's estate, to be administered. I do not think the administrator would, in this case, be a merely formal party, and therefore I do not think the present case is within the spirit of Order 56.

The application therefore must be refused, and with costs.

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HAMELY V. WHYTE.

Production—Communications between solicitor and client.
—*Documents in use in business.*

Communications between solicitor and client are privileged, no matter at what time made so long as they are professional and made in a professional character. (*McDonald v. Putnam*, 11 Gr. 258, not followed.)

The following clause in an affidavit on production was held a sufficient statement of the nature of the documents produced : "I object to produce the documents set forth in the second part of the first schedule on the ground that being communications between solicitor and client, they are privileged."

A defendant was ordered to permit the inspection by the plaintiff of books in daily use in the defendant's business, which he objected to produce on that account, but which he was willing to produce at the hearing of the cause.

Documents formerly in the possession of the defendant, and filed by him in a Master's office in another suit, were directed to be produced by the defendant upon his being indemnified by the plaintiff against the expense of obtaining them out of Court.

[March 9, 1874.—*Strong, V. C.*]

This was a motion by the plaintiff to compel the production of certain documents which were thus referred to by the defendant Whyte in his affidavit on production. "I object to produce the documents set forth in the second part of the first schedule on the ground that being communications between solicitor and client they are privileged."

Production was also sought of books which the defendant declined to produce until the hearing as being in constant use in his business.

Other documents not produced were stated to be filed in the office of a Master of the Court in another suit and the defendant declined to produce these also as being not in his legal possession.

J. C. Hamilton, for the plaintiff, cited *Flight v. Robinson*, 8 Beav. 22 & 39 ; *Reynell v. Sprye*, 10 Beav. 51 ; *Ferrier v. Atwool*, 12 Jur. (N. S.) 365 ; *Wright v. Western Ins. Co.*, 2 Chy. Ch. 403.

N. W. Hoyles, for the defendant Whyte, cited *McFarlane v. Rolt*, W. N. (1872) 168 ; L. R. 14 Eq. 580. Kerr on *Discovery* 140, 134, 136, 37. *Wilson v. Brunskill*, 2 Chy. Ch. 147 ; *Wilson v. Northampton and B. J. Ry.*, L. R. 14 Eq. 477 ; *Minet v. Morgan*, L. R. 8 Chy. 361 ; and *Bethell v. Cassan*, 1 H. & M. 806.

MR. HOLMESTED.—It has been said that all communications which pass between solicitor and client are not exempt from production ; on the

contrary, it must appear that the communications took place between the parties while they held the mutual relationship of solicitor and client, and were made in that character, and not as between mere friends : see observations of Lord Brougham in *Greenough v. Gaskell*, 1 M. & K. 104 ; and see *Thomas v. Rawlings*, 27 Beav. 140 ; *Hampson v. Hampson*, 26 L. J. Chy. 612 ; and I apprehend that this must still be the rule, notwithstanding the difference of opinion which appears to exist as to how far communications made between solicitor and client in that character, are privileged from production.

I do not mean to say that it was incumbent on the defendant to negative in express terms that the communications in question were made between himself and his solicitor, as mere friends, but I do think such a statement of the nature of the documents in question should have been given as would enable the Court to say that the communications were made by the solicitor in his professional capacity.

In *Minet v. Morgan*, L. R. 8 Chy. 361, the plaintiff thus described the documents which he claimed to be exempt from production, viz. : "A correspondence between the plaintiff and his predecessors in title on the one hand, and his and their respective solicitors, from time to time, on the other." The Lord Chancellor evidently thought this a sufficient description, and that by reasonable intendment the correspondence in question must be taken to have been with the solicitors in their character of solicitors : see p. 366. I am inclined, however, to think it would be going beyond that case to hold this affidavit sufficient : see also *McFarlane v. Rolt*, L. R. 14 Eq. 580.

There is, however, a more important question raised on this application and one that the defendant is entitled to to have disposed of, and that is, assuming all the documents in question to have been communications between the defendant and his solicitor in their character of solicitors are they liable to be produced ? I apprehend on this point I am concluded by the case of *McDonald v. Putnam*, 11 Gr. 258 ; that case practically decides that it is only communications made between solicitor and client *post litum motam* that are privileged from production.

In *Minet v. Morgan*, L. R. 8 Chy. 361, to which I have already referred, the same principle was sought to be established ; but the present Lord Chancellor has, I think in that case, decided that the privilege from production extends to all

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communications between solicitor and client, no matter at what time made so long as they are professional communications made in a professional capacity. In *McDonald v. Putnam*, the learned Vice Chancellor points out the distinction which some of the earlier cases appeared to have established as to the relative liabilities of the client and the solicitor to produce confidential communications. In the cases to which he refers, it had been held that the client's liability to produce was much wider than that of the solicitor. So also he refers to another distinction which he considered, the cases of *Pearse v. Pearse* 1 DeG. & Sm. 12 and *Manser v. Dix*, 1 K. & J. 451 had established, viz.: that where the production sought was between vendor and purchaser, the right to call for production was more restricted than in other cases. (See also *Wilson v. Brunsell* 2 Chy. Ch. per V. C. Mowat, p. 150.) In *Minet v. Morgan*, however, the Lord Chancellor seems to rely on no such distinction as the ground of his decision; and his statement of the law on this point is certainly wide enough to include all cases whether the question arise between vendor and purchaser or in any other case. And he quotes with approval what was said by "that most accurate and learned Judge, Sir R. T. Kindersley," in *Lawrence v. Campbell*, 28 L. J. Chy. 780, which statement is quoted also by the learned Vice Chancellor, in *McDonald v. Putman*. In *Lawrence v. Campbell* production was sought from a solicitor, and Sir. R. T. Kindersley says, "It is not now necessary, as it formerly was, for the purpose of privilege and protection (a) that the communication should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional character." This statement of the law the learned Vice Chancellor, in *McDonald v. Putman*, considered was only applicable where the discovery was sought from the solicitor. But in *Minet v. Morgan*, the discovery was sought from the client and the same principle was held applicable. If *McDonald v. Putman* is to be followed, then some, at least, of the documents withheld might be subject to production; at all events, the defendant would have so to shape his further affidavit on production as to shew that they were made *post litem motam*. On the other hand, if *Minet v. Morgan* is to be followed, he would only have to shew that the documents in question are professional communications made

in a professional capacity. On the present state of the authorities (see *Wilson v. Northampton, & B.J.R.* 14 L. R. Eq. 477,) on this question, I think it highly probable that the rule laid down in *McDonald v. Putman* would no longer be followed. I am not, however, at liberty to disregard that decision; at the same time I do not think I should put this defendant to the expense of an appeal, in order to obtain the opinion of a Judge, and I therefore adjourn this application to be heard before a Judge in Chambers.

On the other question raised on this application, however, I may as well also express my opinion. Another class of documents, of which production has been withheld are thus referred to in Mr. Whyte's affidavit. "I object to produce the documents set forth in the third part of the said first schedule, on the grounds that they are in daily use in my office, and are necessary to the conduct of my business; but I do not object to produce them at the hearing of the cause." This would appear to be insufficient. The defendant should have gone farther, and shewn that they could not be removed without inconvenience. See *Hooper v. Gumm*, 2 J. & H. 602.

The plaintiff also seeks to compel the defendant to produce certain documents referred to in Mr. Dartnell's affidavit. This point I disposed of on the argument. The authorities are clear, that the affidavit on production cannot be contradicted by counter affidavits, but that production can only be ordered of documents which the party ordered to produce admits to be in his possession or control, or which, on his own admission made in the proceedings to compel production, there is a reasonable suspicion that he has in his possession; on this point it is only necessary to refer to *Wright v. Pitt*, L. R. 3 Chy. 809; as explained in *Alcock v. Gill*, 21 L. T. N. S. 704.

The only other question which remains is that with reference to the documents which the defendant alleges were filed in this Court in certain suits. As to these I do not think the defendant is in default. The plaintiff, I apprehend, can make application to have the documents forwarded by the officer in whose custody they may be, for production in this suit; and I think he should adopt that course.

9th March, 1874.

The motion now came on to be held before V. C. STRONG, who held that the affidavit was sufficient as to the alleged privilege communications

(a) In the Law Reports (8 Chy. 368) this quotation is taken from the report of *Lawrence v. Campbell* in 4 Drew. 490, where instead of the words "privilege and protection" the words "obtaining production" occur.—REP.

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between solicitor and client, which communications he held were not liable to production, following *Minet v. Morgan*, L. R. 8 Chy. 361. He however directed defendant to procure the documents filed in Chancery to be produced in this suit on being indemnified by the plaintiff against the expense of getting them out of Court, and he also directed the defendant to permit the books which were required in his business to be inspected by plaintiff.

BENNETTO v. BENNETTO.

Partition—32 Vict. cap. 33, (O.)—Allowing petition.

The Partition Act of 1869, only applies to cases in which some common title in the petitioner and respondents, to the land in question, is admitted.

[March 16, 1874.—*Blake, V. C.*]

This was a motion under sec. 15, of 32 Vict., cap. 33, for an order allowing a petition for partition.

The petition stated that on 8th May, 1872, a conveyance of a portion of the land sought to be partitioned had been made for value to John Bennetto the intestate, by Dennis Milligan, tenant for life of the same, and Mary Holden who was entitled in remainder; that Mary Holden was a married woman, living separate and apart from her husband who was not a party to the conveyance; that the conveyance contained a covenant for further assurance, and was registered on the 9th May, 1872; that on 26th May, 1873, Mary Holden professed to convey the said lot to the defendant J. E. O'Reilly, her husband not being a party thereto, and no order having been obtained dispensing with his concurrence; and that in March, 1872, Mary Holden and her husband conveyed the same lot and other lands to the defendant O'Reilly, which conveyance was registered on 30th May, 1873. The last two conveyances were alleged to have been made without consideration, and though absolute in form, were intended to convey the lands comprised in them in trust for Mary Holden.

The petition further stated that defendant O'Reilly conveyed the said land to the defendant Ashbaugh, by deed dated 1st August, 1873; that defendant Ashbaugh had mortgaged the said lot to defendant J. E. Worthington; and that on 14th October, 1873, Mary Holden duly con-

veyed the same premises to the plaintiff Mary Bennetto, in trust for the representatives of John Bennetto the intestate.

The petition prayed that it be declared that the defendants O'Reilly, Ashbaugh, and Worthington had no interest in, or lien upon, the lot in question.

G. W. Badgerow, for the plaintiffs.

C. Moss, for the defendants O'Reilly and Ashbaugh, who intended to resist partition of the portion of lands in question.

Cuthbert v. Cuthbert, 11 Gr. 88, and *Bouck v. Bouck*, 35 Beav. 643, were referred to.

BLAKE, V. C.—I do not think that this is a case for the operation of the Partition Act. That Act is only intended to apply to simple cases where some common title in the petitioner and respondents is admitted, and the only question is the extent of the interests of the various parties. The object of an application for the allowance of the petition is to require the petitioner to shew that he was entitled to partition before the case is referred to the Master to ascertain the amount of his share. It is essential in proceeding under this Act that the petitioner should admit some title in the respondents. In cases like the present where any title in the respondents is denied, the Court must be applied to in the ordinary way by bill.

Application dismissed with costs.

WALDRON v. MCWALTER.

Security for Costs—Misdescription of the plaintiff in bill.

The Court will order a plaintiff to give security for costs if he misdescribe himself in his bill through an improper motive, or with the intention of misleading the defendant, even though on the application for security the plaintiff should furnish his true address.

A plaintiff who had been for several years and was at the time of the filing of the bill, resident in the United States, described herself in her bill as of the Township of Bertie, in the Province of Ontario. Under these circumstances the Court refused to discharge an order for security, although the plaintiff had returned to the jurisdiction and stated that it was her intention to reside there for the rest of her life.

[March 16, 1874.—*Blake, V. C.*]

Motion to discharge an order for security for costs.

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The bill in this cause, filed in October, 1871, described the plaintiff as "of the Township of Bertie, in the County of Welland." In November, 1871, the defendant applied to the Court, on affidavits, shewing that the plaintiff then, and for ten or eleven years previously, had resided in the city of Buffalo, in the United States of America, and he obtained on notice the usual order for security for costs. This order never was complied with, and in December, 1872, an application was made to discharge it, on the ground that the plaintiff had returned to the Province of Ontario, there to reside permanently as long as she lived.

The evidence on the application shewed that the plaintiff had resided many years in the Township of Storrington, in the County of Frontenac, until about 1854, when she went to Buffalo, and there she had resided until December, 1873, since which date she had been living with her daughter, at Fort Erie, in the Township of Bertie.

The REFEREE made the order asked.

The defendant appealed from this order.

J. S. Ewart, for the defendant, cited *Sandys v. Long*, 2 M. & K., 487; *Marsh v. Beard*, 1 Chy., Ch. 390; *Watson v. Yorston*, 1 C. L. J., 97.

John Crickmore, for the plaintiff. To entitle the plaintiff to the discharge of the order for security, it is only necessary for her to shew that she is now residing, with the intention of remaining, at the place where she is alleged in the bill to be resident.

He referred to *Place v. Campbell*, 6 Dowl. & L.; 113, and *Crispin v. Doglioni*, 1 Sw. & Tr. 522.

BLAKE, V. C.—There is no pretence that the plaintiff ever resided in the Province of Ontario, near to the Township of Bertie, until she removed in December last to Fort Erie, nor is there any pretence but that the plaintiff's solicitor knew when the bill was filed that she lived out of the jurisdiction. No reason was or can be assigned for describing the plaintiff as of the Township of Bertie in place of Buffalo, except that the one statement at once rendered the plaintiff liable to an order for security for costs, whereas, the other, unless the defendant were put on his guard as to the residence, would enable the

plaintiff to proceed freed from this obstacle to the prosecution of her suit. It not being alleged that the description of the plaintiff was inserted inadvertently, we have it that she, at that time residing out of the jurisdiction, purposely describes herself as of a place within the jurisdiction, where her daughter lived, and some 200 miles distant from the place she actually did live at when she resided in Canada: the result of such a description being that if its incorrectness were undiscovered, she escaped the necessity of giving a bond to answer the costs of the suit. The only object then, to be accomplished was to mislead the defendant; and for a fraudulent purpose, wilfully, and not innocently or inadvertently, the plaintiff described herself as she did. I think this being so and the intended trick of the plaintiff having been discovered, and she compelled to secure the defendant against the costs of the suit, it is immaterial whether she subsequently comes within the jurisdiction or not. The price she pays, being detected in carrying out this fraud upon the defendant, is that the order stands against her. There was a chance that her misstatement might be overlooked, whereupon she obtained a benefit, but the chance turning against her she must not object to pay the penalty, which prevents her invoking the general rule that one out of the jurisdiction when the bill is filed, and thereafter returning within it, is entitled to an order discharging the order for security for costs obtained against him.

No doubt the rule was laid down more broadly in the older than in the more recent cases. In Smith's Chy. Pract., vol. 1, p. 557, ed. of 1837, it is said: "If a plaintiff in his bill, mistakes his place of residence, the court will order him to give security for costs." In the edition of 1855, page 504, this statement is thus modified:—"If a plaintiff in his bill gives an insufficient description of his residence or wilfully misstates his place of residence, the Court will order him to give security for costs, but not where it is done innocently or from mere error, or merely on the ground that, at the time of filing the bill, the plaintiff was not actually resident at the place of which he is described." The authority given for these propositions of Mr. Smith is the case of *Sandys v. Long*, 2 M. & K., 487, where it is laid down that if a plaintiff upon his bill misstates his place of residence, the Court will order him to give security for costs, and the case is based on the rule laid down in *Fowler*, Ex. Pract., and the following statement of Lord Redesdale, (*Mitford on Pleading* 5th ed. p. 49): "In the second place are contained the names of the par-

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ties complainants, and their descriptions, in which their abode is particularly required to be set forth, that the Court and the parties defendants to the bill may know where to resort to to compel obedience to any order or process of the Court, and particularly for payment of any costs which might be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit." The rule I conceive to be in force at the present day is thus laid down by the Master of the Rolls, in *Simpson v. Burton*, 1 Beav., 556. "There can be no doubt that it is the duty of a plaintiff to state his place of residence truly and accurately at the time he files his bill, and if for the purpose of avoiding all access to him, he wilfully misrepresents his residence, he will be ordered to give security for costs."

In *Hurst v. Padwick*, 12 Jur., 21, *Sandys v. Long* is commented on, and is said, as reported, to lay down the law too widely. The Court there concluded that although there be a misdescription, if it be not through fraud, but merely through error or inadvertence, security will not be ordered. Lord Langdale in *Kerr v. Gillespie*, 7 Beav. 269, refused the application, because, as he says: "There does not appear to have been any wilful intention to mislead." In *Knight v. Cory*, 9 Jur., N. S., 491, the present Lord Hatherly says: "In the absence of fraud, a plaintiff or defendant, being a subject of the realm and having a fixed abode, cannot be required to give security for costs. * * In this case there is no evidence of fraud, and it appears to come within the authority of *Hurst v. Padwick*." The case of *Dick v. Munden*, 13 W. R., 1013, may also be referred to in this point.

From these authorities it seems clear that if a plaintiff thus describes himself and the defendant proves this on an application for security for costs, the plaintiff will be allowed to shew that the description was inserted inadvertently or innocently, and thereupon he will be allowed to amend, and no other ground being alleged for granting the order, it will be refused. It seems equally clear that if the misdescription be inserted through an improper motive or with the intention of misleading the defendant, then the Court will order security to be given, although the defendant may on the application furnish his true address. The rule is a most reasonable one, and I willingly follow it. The Referee informs me that this objection on which I determine the motion was not taken before him. This being so, I reverse his order, but without costs. The

order will refuse the application made to discharge the order for security for costs with costs, no costs this appeal to either party.

HIGGINS v. MANNING.

Security for costs—Nature of property within the jurisdiction necessary to discharge order for security.

A plaintiff resident abroad will not be released from giving security for costs, unless he shew that he has property to the value of \$400 within the jurisdiction of the Court and available in execution.

Leasehold property may be sufficient.

The plaintiff had property within the jurisdiction, consisting of a one-sixth interest (nominally worth \$2,666) in lands subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. This lease was for twenty-one years, and gave the defendants an option to purchase; under its terms no rent or taxes were to be paid until the title had been quieted under the Act for Quieting Titles, or a certificate was refused; in the latter event the defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending.

The plaintiff's interest in this property was held insufficient to entitle him to the discharge of an order for security.

[March 9, 1874—Referee—March 23, 1874.—Strong, V. C.]

This was a motion made by the plaintiff to discharge an order requiring him to give security for the defendants' costs, on the ground that he had property within the jurisdiction sufficient to answer the defendants' costs, if any should be awarded them.

The bill was filed to set aside, on the ground of undue influence, a lease with right of purchase, made by the plaintiff's ancestor, and the property upon which the plaintiff relied to entitle him to discharge the order, was the property in respect of which the lease of in question was made. In this property the plaintiff had a one-sixth interest.

The terms of the lease were peculiar. It was for twenty-one years, giving the defendants an option to purchase for \$16,000. The rent reserved was £323 per annum, and payment of this rent was subject to the following proviso: "Provided that the lessor shall proceed forthwith to have the title to the demised premises quieted under the Statute for Quieting Titles, and that the rent and payment of taxes by the

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lessees shall not commence until the Court of Chancery has granted a certificate under the Act, but from and after the date of such certificate the said rent shall commence and be payable. And it is further provided that if a certificate of title be refused, then the lessees are either at once to accept the title, notwithstanding the refusal, or to give up the term."

The lease was dated 23rd December, 1868. A petition under the Quieting Titles Act was filed 30th December, 1868, but no certificate had been obtained.

James Bethune, for the plaintiff. If the lease is held good and the plaintiff ordered to pay costs, the defendants have sufficient security for the costs either in the rent which they would have to pay to the plaintiff, or in the purchase money, in case they exercise the option to purchase. He cited *Re Carroll*, 2 Ch. Ch. 305; *Le Normand v. Prince of Capua*, 6 Jur. O. S. 64; *Bristowe v. Needham*, 2 Dowl. Pr. Ca. N. S. 658.

J. Bain, for the defendants. The security offered is not such as would be saleable in execution, and that is the description of property to which the defendants are entitled. *Re Carroll* is only authority for the allowance, as security for costs, of a debt actually due by the plaintiff to the defendants. Here no rent is due, the title not having been quieted, and the suit may be determined for fifteen years before either the rent or the purchase money becomes payable.

R. M. Wells, for a person to whom the plaintiff had mortgaged his interest, consented to be postponed to any claim against plaintiff for costs.

MR. HOLMESTED.—Should the plaintiff succeed in this suit, he would be entitled to one undivided sixth interest in the fee. Should he fail he would only be entitled to one-sixth interest in the reversion, subject to the lessees' right of pre-emption; and in the event of the lessees exercising their right of purchase, then to one-sixth of the \$16,000, the amount of the purchase money. Now for the purpose of this application I do not think I can for a moment assume that the plaintiff will succeed. The defendants rely on a bargain which has been formally entered into by them with the plaintiff's ancestor, and however improvident it may appear to be, they are entitled to say that it is valid and binding upon the plaintiff until it has been

actually set aside by a decree of this Court. I must therefore for the present motion assume that the lease is valid, and that the interest of the plaintiff in the property in question is subject to the terms of the lease, and so assuming I am to consider whether that interest is of such a character as to afford the defendants sufficient security for their costs.

Now the test laid down by the cases appears to be this. Is the property of sufficient value, and would it be liable to sale under execution? I think the plaintiff's interest in the land in question as owner of one-sixth interest in the reversion could be sold under execution; but looking at the peculiar nature of that interest I am doubtful whether it would, if sold under an execution, realise \$400. By the terms of the lease no rent is payable, and it would seem none can at any time hereafter be claimed for any part of the term of twenty-one years, which may elapse before a certificate quieting the title shall have been obtained or have been refused. So that, so long as the proceedings to quiet the title are pending, the lessees are entitled to the possession free from any liability for the payment of either rent or taxes. Now it is well known that the interest of a tenant in common is not so saleable nor so valuable as that of a tenant in severalty; purchasers of an undivided interest, have to take the risk of having to incur the costs of a partition suit, and other expensive proceedings. The estate of the plaintiff in the land in question labours not only under that disadvantage, but also under the burthen of the extraordinary conditions of this lease; and although the plaintiff's interest in the lands in question may be as he contends sufficiently valuable, no matter what the issue of this suit may be, yet I think his title is so shrouded with objectionable features, that it is very doubtful whether any purchaser at a sheriff's sale could ever be found to give anything like its value. At the termination of this suit, assuming it to be in favour of the defendants, and the plaintiff is ordered to pay their costs, the defendants would be under no obligation to wait until the proceedings to quiet the title were brought to an end before enforcing payment of their costs. How long those proceedings will last is doubtful, they have been in progress already for over five years and are not ended yet, and there is no certainty when they will be concluded. Now until those proceedings have been brought to an end, could the plaintiff's interest in the property be offered for sale, under an execution, with any reasonable prospect of a purchaser being found

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willing to give more than a nominal price? Seeing that a purchaser would acquire no present right, either to the possession of the property itself, nor yet to the rents of it, but only a right to receive a rent which might or might not accrue at some future time, in the event of the certificate quieting the title being granted or refused, and that under the wording of the lease this right might be indefinitely postponed, but that nevertheless the purchaser, without deriving any benefit from the property, would nevertheless have to assume the payment of the taxes. I very much doubt whether anything but a merely nominal price could be realised by a sale under execution of the plaintiff's interest in the land in question, and having this doubt I do not think I should set aside the order for security for costs as asked.

The motion therefore is refused with costs (a).

The plaintiff appealed from this decision, and the appeal was heard by STRONG, V. C., who affirmed the order of the Referee.

The view which his Lordship took was, that the purchase money of the property could not be regarded as a fund of the plaintiff's; but for all that appeared on the motion, might ultimately belong to the creditors of the plaintiff's ancestor, the lessor. At present it belonged to the personal representative of the lessor, whose estate had not been fully administered; and this fund would have to be applied with the other assets of the lessor, in due course of administration, while there was no material upon the present motion upon which it was possible to say that there would be any residue to be distributed after payment of debts. It was true that at present it might be considered as land, the option to purchase not having been exercised, but when the option was exercised a conversion of the property would take place, not from that time, but from the prior time, the date of the agreement before the death of the lessor, so as to cut out the interest of the heirs-at-law. This distinguished the case from *LeNormand v. The Prince of Capua*, as the fund there was the fund of the plaintiff, money actually payable by the defendant to the plaintiff.

He therefore considered that it was reasonable that the defendants should not be deprived of the order for security which they had obtained.

Appeal dismissed with costs.

(a) See *Galt v. Spencer*, 2 Chy. Ch. 292; *Swinbourne v. Carter*, 23 L. J. N. S. Q. B. 16.—REP.

SWETNAM V. SWETNAM.

Administration order—When administrator may apply.

The fact that the assets of an intestate's estate are less than the liabilities is sufficient to justify an application by an administrator for an administration order notwithstanding that the estate consists solely of personalty.

[March 23, 1874—Strong, V. C. on appeal from Referee.]

This was an application by an administratrix for an administration order.

The debts of the estate, which consisted solely of personalty, were shown to exceed the assets, and the administratrix applied for administration under the order of the Court, in order to save the expense which would result from the creditors seeking to obtain priority and taking legal proceedings.

R. M. Wells for the application.

A. G. M. Spragge, for the infant defendants, consented to an order going.

MR. HOLMESTED, referring to *Barry v. Barry*, 19 Gr. 458, held that the administratrix had not shewn sufficient difficulty in the way of administering the estate to entitle her to an order.

The administratrix appealed.

W. G. P. Cassels, for the appeal cited *White v. Cummins*, 3 Gr. 602; *Cole v. Glover*, 16 Gr., 392; *Barry v. Barry*, 19 Gr., 458; *Doner v. Ross*, 19 Gr. 233; and *Parsons v. Gooding*, 33 U. C., Q B., 499, 459.

Hoskin, Q. C., for the infants, supported the order.

STRONG, V. C., reversed the order of the Referee. He considered that, wherever there was a deficiency of assets, so that all creditors were entitled to share *pari passu*, the distribution of the assets became too perilous a task for an administrator to perform alone, and he was entitled to the protection of the court.

*Order granted.**

* See *Re Ette, post*, p. 157.—REP.

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OUTRAM V. WYCKHOFF.

Administration order—Will not proved.

An administration order, applied for against a person named in the will as executor, but who had not taken out letters of probate, was refused.

[March 24, 1874.—*Referee.*]

Geo. Murray, on behalf of a legatee, applied for an administration order.

The person named in the will as executor had been served, but he had not yet proved the will.

MR. HOLMESTED thought that until this was done, no order could be made. He referred to *Rovsell v. Morris*, L. R. 17 Eq., 20.

Order refused.

RE W. ½ CON. 6, MONO.

Quieting Titles Act—Possession—36 Vict., c. 8, sec. 31.

Section 31 of 36 Vict., c. 8, (O.) does not make any alteration in the rule that a petitioner under the Act for Quieting Titles, must have substantially an estate in possession or a certificate will be refused.

[March 30, 1874.—*Referee—Strong, V. C.*]

A petitioner under the Act for Quieting Titles had not an estate in possession in the lands, the title to which he sought to have quieted.

T. S. Kennedy for the petitioner. It is not necessary that a petitioner under the Quieting Titles Act should be in possession. Since 36 Vict., cap. 8., sec. 31, which enacts that where a suit is instituted or a petition filed in the Court of Chancery, for the purpose of establishing the title of the plaintiff to any real property, if it appears that the plaintiff or petitioner is entitled to the possession of real property, he may obtain an order against the defendant or respondent for the delivery of such possession.

MR. HOLMESTED held that the section referred to does not apply to proceedings under the Act for Quieting Titles, and following *Re Bell*, 3 Chy. Ch., 239, and *Re Mulholland*, 18 Gr. 528, he dismissed the petition.

Kennedy, for the petitioner, appealed.

STRONG, V. C., agreed with the view taken by Mr. Holmested, and dismissed the appeal.

PETERSON V. PETERSON.

Interim alimony—Con. Order 488.

An omission to make the endorsement directed by Con. Order 488 to be made upon the office copy of the bill served, does not disentitle the plaintiff to apply on motion for interim alimony, but is a question merely affecting the costs of the motion.

Where a plaintiff had neglected to proceed to a hearing at the first hearing term after issue joined, it was held that this was no bar to her obtaining interim alimony: it appearing that the neglect was owing to a mere slip on the part of her solicitor, that she had a *bona fide* intention to go to a hearing and had made offers to change the venue, with a view to enable the cause to be speedily heard.

[April 4, 1874.—*Referee, April 20, 1874.—Strong, V. C.*]

This was an application for interim alimony made after the cause was at issue. The plaintiff had set the cause down for hearing at the spring sittings of the Court at Guelph, 1874, but by mistake of her solicitor notice of hearing had not been served in due time.

W. G. P. Cassels, for the plaintiff. It has been through no fault of the plaintiff that the cause is not to be heard at Guelph; and she is willing, and offers to have the venue changed and the case heard at Hamilton, or elsewhere this spring. The order should therefore be granted: *Devlin v. Devlin*, 3 Chy. Ch. 491; *Weir v. Weir*, 1 Ch. Chy. 194.

Jas. McLennan, Q.C., for defendant, resisted the motion, on three grounds: (1.) because it was not shewn that the office copy of the bill served was endorsed with the notice required by Order 488; (2.) Because the fact of the plaintiff having neglected to proceed to a hearing at the spring sittings, was a bar to her obtaining interim alimony, because, had she already obtained an order for its payment, this neglect would have been a ground for suspending all further payments; (3.) Because the plaintiff had used the answer of the defendant for the purpose of proving the marriage; and as it also contained charges of adultery, these, remaining uncontradicted, constituted a bar to the plaintiff's obtaining the order she asked. He cited *Rogers v. Rogers*, 34 L. J. (Mat.) 87.

Cassels, in reply. The directions of Order 488 are not compulsory. The endorsement there mentioned is, as is seen from Order 489, only to enable the defendant to submit to pay the amount claimed without the necessity of a motion and its accompanying costs. The late Referee has held that the omission of this endorsement does not disentitle the plaintiff to make a motion. At

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most it would deprive her of the costs of one. Besides Order 488 has been rendered nugatory by the effect of the Act 32 Vict., c. 18, for fixed costs cannot be claimed in the endorsement since that Act, and an application is rendered necessary in order to obtain them.

MR. HOLMESTED.—The plaintiff, it appears, set the cause down for hearing at the spring sittings of the Court at Guelph, but by mistake omitted to give due notice of hearing. The sittings of the Court at which the cause ought to have been tried, and at which, had the plaintiff applied for interim alimony before the replication was filed, she would have had to undertake to bring the cause on for trial, has thus been lost. The motion is resisted on three grounds.

[The Referee stated them.]

Order 488, I am informed by the late Referee, has been construed to be permissive and not compulsory; and that is the conclusion at which I should have arrived. The omission to indorse the notice provided by Order 488 may be a ground for refusing the plaintiff the costs of the motion in chambers, but I do not think it can be urged as a bar to her obtaining interim alimony.

The case of *Devlin v. Devlin* seems to be an authority on the second point raised by the defendant. In that case the plaintiff had obtained an order for interim alimony upon the usual terms of undertaking to proceed to a hearing at the next sittings of the Court. These sittings were lost through the slip of the plaintiff's solicitor, and the defendant moved to dismiss. The plaintiff having done her best to repair the omission the motion was refused, but the interim alimony was ordered to run from the date of the order, and the defendant was relieved from payment of arrears which had previously accrued.

If the defendant's contention were right the proper order in that case would have been to suspend the payment of interim alimony altogether from the date of the sittings which had been lost. The circumstances of that case and the present are very similar, and as the interim alimony was not altogether suspended in that case, I do not think I can properly refuse to grant it in this.

It has been frequently held that on applications for interim alimony the merits cannot be gone into, and I see no reason for departing from this rule in the present case.

I do not think the plaintiff can be held to admit all the allegations in the answer merely

because she has read therefrom the paragraph admitting the marriage, and I think she was not under the necessity of producing any evidence in contradiction of the charges of adultery contained in the answer.

I think the plaintiff is entitled to interim alimony but it must run only from this date, and she will get no costs of this motion, nor yet of the reference to the Master.

The order of the Referee was appealed from; but, on 20th April, it was affirmed by STRONG, V. C., with costs.

WEISS v. CRAFTS.

Vendor and purchaser—Execution of the conveyance.

Under the 5th clause of the standing conditions of sale the purchaser makes a sufficient tender of the conveyance for execution by delivering it to the vendor's solicitor; and it is the duty of the vendor to procure its execution by all necessary parties.

The purchaser is not bound to pay the expense of procuring the execution of the conveyance, unless there be an express condition to that effect.

Until the conveyance is completed and delivered to the purchaser, he may properly resist payment out of Court of any part of his purchase money.

[April 20, 1874.—Referee.]

W. G. P. Cassels, for the plaintiff, moved for payment of part of the purchase money out of Court, on the ground that the purchaser had accepted the title by going into possession.

Armour, (Harrison, Osler & Moss) for the purchaser, in the first instance resisted the motion on the ground that he had not obtained a conveyance from all proper parties. Pending the motion, the conveyance was completed.

MR. HOLMESTED.—The plaintiff and certain of the defendants who had executed the conveyance before the motion contend that having done so they cannot be affected by the refusal of other necessary parties to execute the conveyance to the purchasers. It was said that it is the purchaser's duty to get the conveyance executed by all requisite parties, and that each party is entitled to have his share of the purchase money paid out as soon as he has executed

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the deed. I do not think they have any such right, and on the contrary I think a purchaser may properly resist payment of any part of his purchase money out of Court until he has obtained a proper conveyance from all necessary parties, neither do I agree to the plaintiff's contention that a purchaser buying under the standing conditions of sale is bound to get the conveyance executed, that I think is a duty that is cast upon the vendor, *i. e.*, the party having the conduct of the sale. In Smith's Pr. 1014, it is said: "The conveyance being settled, the vendor must procure the same to be executed by all necessary parties. In the absence of a condition to the contrary the expense attending the perusal and execution of the conveyance is always borne by the vendor." This is borne out by Sugden V. & P. 14 ed. p. 561.

I am unable to see that the standing conditions of sale conflict with the rule thus laid down : they provide that the purchaser shall have the conveyance prepared at his own expense, and tender the same for execution." This, of course must be construed precisely as a similar condition would be construed on a sale out of Court, and I think there can be little doubt that on a sale out of Court it would be held to mean a tender to the vendor. Now in sales under the decree of the Court there are often many parties who are in fact vendors ; (see Dart V. & P. 4th ed. 1084) yet, according to the practice of the Court, to one out of the many is committed the conduct of the sale, and he becomes for all purposes of the sale the vendor, and he represents all the other parties interested in the estate in all matters connected with the sale. For example it is by him the abstract of title is delivered, by him that the objections and requisitions are answered, and he it is who represents all parties should a reference as to title become necessary. (See *Dalby v. Pullen*, 1 R. & M. 296 ; *Dale v. Hamilton*, 10 Hare App. vii.) The party having the conduct of the sale being thus, according to the practice of the Court, constituted the vendor, it is to him the purchaser must tender the conveyance ; and it is his duty as vendor to get it executed by all necessary parties. To hold otherwise would be to throw the expense of execution on the purchaser, and that in the absence of any condition to that effect. But although the purchaser may insist on the vendor procuring the due execution of the conveyance it seems he has also himself a right to compel parties to execute the conveyance, who refuse to do so. See Danl. Pr. 5 ed. 1173.

In the present case the purchaser has not chosen to insist on his right to compel the vendor to get the deed executed, he has himself undertaken the task and it has not been shewn that he has been guilty of any delay in getting it executed. Until he had obtained a proper conveyance he was justified in resisting an application of this kind, and I therefore think he is entitled to his costs. His acceptance of the title does not waive his right to call for a proper conveyance. As he admits he has now obtained his conveyance, the order can go as asked subject to the payment out of his purchase money of the costs of this application. The motion having been made prematurely I do not think the applicants are entitled to any costs.

WILSON v. WILSON.

Security for costs—Order on praecipe—Nature of property within the jurisdiction necessary to discharge order.

An order for security for costs can only be obtained upon *praecipe* when the plaintiff admits on the face of the bill, that he is resident abroad, and there is nothing in the bill qualifying such admission.

Where a bill described the plaintiff as "of the city of Toronto," but afterwards contained the following statement "by the advice of a physician the plaintiff has sought change of air, and is now temporarily resident at Rochester."

Held, that it must be concluded that the residence was only temporary, and no order for security should be granted.

Nature of the property within the jurisdiction necessary to discharge an order considered.

[April 27, 1874.—*Strong, V. C.*, on appeal from *Referee*]

The plaintiff was described in the bill in this case as "of the city of Toronto, in the county of York."

A subsequent allegation was as follows : "on or about the 12th day of October last, by the order of a physician the plaintiff sought change of air and went to Rochester where she is now temporarily resident."

Upon this allegation the Clerk of Records and Writs issued, on *praecipe*, an order for security for costs. This motion was for the discharge of the order : (1.) "Because the order had been obtained *ex parte* upon *praecipe*, although the bill described the plaintiff as of the city of Toronto, and had stated that she was only tempo-

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rarily resident out of the jurisdiction." (2.) Because the plaintiff had property within the jurisdiction as appeared from the nature of the suit."

The suit was instituted for the purpose of setting aside the will of the plaintiff's husband under which the plaintiff was entitled to an annuity of \$800.

The application was supported by an affidavit made by the plaintiff's solicitor, in which he stated:—"The defendants, Catharine Wilson and Charles Beatty, are co-executors of the will in question in this suit, and besides, the plaintiff's interest in this suit the plaintiff is further entitled to about \$3,000, more or less, from her father's leasehold and freehold estates devised to her late husband, Thomas Wilson, and the proceeds of the sale of said estate, amounting to about \$7,000, have come to the hands of the defendants, Catharine Wilson and Charles Beatty, as executors of the said Thomas Wilson, and the same with the plaintiff's share continues in the hands of defendants, as I verily believe; the plaintiff has, moreover, the sum of \$2,000 and upwards, on deposit at interest in a Bank in the city of Toronto, as I am informed and verily believe."

Donovan, for the plaintiff, cited *Hoby v. Hitchcock*, 5 Ves., 699; *Ganson v. Finch*, 3 Chy. Ch., 296; *White v. White*, 1 Chy. Ch., 48; *Joie v. Keogh*, 7 Ir. Eq., 90; *Green v. Charnock*, 2 Cox 284; *Blakeney v. Dufaur*, 2 DeG. M. & G. 771; *Kerr v. Gillespie*, 7 Beav., 269; *Edwards v. Burke*, 9 L. T. N. S., 406; *Anon.*, 2 Dick., 775.

W. Fitzgerald, for the defendant. The order for security is regular : Taylor's Con. Orders, 293. *Lillie v. Lillie*, 2 M. & K., 404; *Marsh v. Beard*, 1 Chy. Ch. 390. The existence of real property, unincumbered, within the jurisdiction, is the only ground upon which an order for security will be discharged. Personal property is not sufficient. It is stated in the bill that after payment of debts there will be no funds to satisfy the annuity left to the plaintiff by her husband : See *Kilkenny Railway Co. v. Fielding*, 6 Ex., 81.

MR. HOLMESTED.—It was held in *Lillie v. Lillie*, 2 M. & K., 404, that when it appears upon the bill that a plaintiff is out of the jurisdiction, the defendant is entitled, as of course, to security for costs, unless circumstances are distinctly stated which show that the plaintiff is exempted from the liability to give security. It appears by this bill that the plaintiff is resident out of the juris-

diction, and it is true that there is also an allegation that her residence out of the jurisdiction is temporary, and for the benefit of her health, but this is not a circumstance which exempts her from liability to give security, inasmuch as it does not appear that she has any permanent residence within the jurisdiction. The order of course, obtained in this case was, therefore, I think, properly obtained.

Then the plaintiff seeks to set aside the order, on the ground that she has sufficient property within the jurisdiction. The bill alleges that after satisfying prior charges there is *no remaining estate* belonging to deceased, out of which the annuity to the plaintiff can issue. It is true this is not conclusive evidence against the plaintiff, but at the same time, there is no evidence to the contrary. I cannot see that Mr. Donovan's affidavit in any way establishes that the plaintiff would in the event of her failing in this suit have any substantial interest whatever in her husband's estate. So far as her interest in this suit is concerned, therefore, I think it is not shown that it affords the defendants any security. Then, with regard to the share which the plaintiff claims in her late father's estate which was devised to her husband. How she claims this share of her father's estate does not appear. I assume it must be under the will of her father, but even in that event she would only be entitled subject to the payment of the debts of the testator, and it is not shown that all his debts have been paid or that any division has taken place, by which her right to the share she claims has been admitted or paid to her; on the contrary, it appears from Mr. Donovan's affidavit that it has not been paid over. The defendants, Wilson and Charles Beatty, admit that there is a sum of \$680, belonging to the plaintiff's father's estate, deposited in the Toronto Savings Bank, to the credit of the late Thomas Wilson and also that certain mortgages to secure the purchase money due that estate, were taken by the late Thomas Wilson, in his own name, to which, they, as executors of his estate, would be entitled, but although it is thus admitted that the defendants, as executors under the will which the plaintiff seeks to set aside, may have some interest in the money and mortgages, it is not admitted that the plaintiff has any beneficial interest therein, and the affidavit of Mr. Donovan is quite insufficient to establish that she has such an interest as would be sufficient security to the defendants for their costs. This point was raised on an appeal from an order made by me, lately, in the suit of *Higgins v. Manning*, (see

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ante p. 147) and Strong, V. C., held that a defendant ought not to be put to administer an estate in order to realize his costs. In order to ascertain what interest Mrs. Wilson may have in the O'Dea estate it may become necessary to administer that estate. Property to which a party is entitled, which is subject to such a contingency, before it can be realized, is not the kind of property the possession of which will entitle a plaintiff to have an order of this kind discharged. The case in 6 Ex. 81, is an authority against the sufficiency of the money alleged to be on deposit at interest as a security.

The motion must be refused and with costs.

The plaintiff appealed from this decision.

On the 27th April, 1874.

STRONG, V. C.—The recital in the beginning of the bill is that the plaintiff is of the city of Toronto, in the county of York, and to say that she is resident in Rochester is unwarranted by anything in the remainder of bill. If it appears from the description of a plaintiff in the title of the bill that he is without the jurisdiction, the Clerk of Records and Writs, acting in a ministerial capacity, will grant an order for security, but in this bill the plaintiff describes herself as of the city of Toronto, in the county of York, and it is said that this is qualified by some subsequent allegations in the bill. This is a question for a judicial decision, and not for the Clerk of Records and Writs to deal with. He has acted most erroneously in issuing the order, and on this ground alone I would discharge it. But, besides this, if the case had come before me originally, and I were called upon to say whether the 13th paragraph of the bill so qualifies the recital in the title, so as to make the defendant entitled to security, I should not have granted the order. The defendant says it is shewn not to be true that the plaintiff is resident in Toronto by the words in the 13th paragraph of the bill,—“On or about the — day of October, by the advice of a physician, the plaintiff sought change of air, and went to Rochester, where she is now temporarily resident.” I am asked to decide that a plaintiff being temporarily resident out of the jurisdiction is bound to give security for costs. Unless something more than temporary residence is shewn I do not think a plaintiff should give security. If on account of ill health the plaintiff intends to reside permanently abroad, that would be a

very different case. Where the residence out of jurisdiction is permanent an order for security for costs is proper. If the bill in this case instead of saying that the plaintiff was temporarily resident in Rochester, had alleged that she had gone abroad and was at present resident at Rochester, I should have been inclined to assume, on the principle that allegations are to be taken most strongly against the pleader, that the plaintiff's residence was at Rochester; but when the residence is expressly said to be only temporary I must assume it is only a temporary residence at Rochester. To decide otherwise would be to say that if a plaintiff goes, during the summer months, to a watering place in the Lower Provinces or the United States, he is liable to give security.

This view of the subject is also, I think, borne out by two of the authorities cited, one by the defendant, *Lillie v. Lillie*, 2 M. & K. 404; and the other by the plaintiff, *Edwards v. Burke*, 9 L. T. N. S., 406.

The order will, therefore, be discharged, with costs both of the present appeal and of the motion in Chambers.

Appeal allowed.

REDFORD v. TODD.

Vacating pro confesso decree—Delay—Costs.

Two defendants allowed a bill to be taken *pro confesso* against them, because they had not the means to employ a solicitor to defend the suit, and a *pro confesso* decree was obtained. An application to vacate the decree and for leave to answer was granted upon payment of costs, a *prima facie* good defence on the merits being shewn.

Costs of evidence to disprove the merits of the defence set up must not be incurred without consideration and will not be allowed as of course.

[April 6, 1874.—*Referee.* April 21.—*Strong, V. C.*]

This was an application by defendant, Jane Todd, to set aside a decree obtained *pro confesso* and the subsequent proceedings thereon, and for leave to answer. The bill was filed 28th April, 1873. It was noted *pro confesso* against the defendant, James Todd (the husband of the present applicant,) on the 24th June, 1873. Subsequently an order was obtained for the defendant, Jane Todd, to answer separately, and she was served with the bill on 30th June, 1873, and on 19th September, 1873, it was noted *pro confesso*

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against her. On the 1st October, 1873, the decree was obtained, which was duly carried into the Master's office, and a report was made in pursuance thereof on the 1st December, 1873.

The defendant alleged that the reason she did not file her answer in due time was because she was unable, on account of poverty, to procure legal advice. The defendants appeared to be in poor circumstances; and from the affidavits it seemed that when the husband was served he made an effort to procure legal assistance to defend the suit, but failed from not having means to pay the costs. Mrs. Todd stated that she was served with the bill while her husband was away from home, that she was ignorant of business and was totally ignorant of what she ought to have done after being served with the bill, and having no means to employ a lawyer she thought it useless to go on after her husband had been unsuccessful, and that the reason she was now able to make the application was that her friends had offered to assist her.

A. Hoskin for the defendant, Jane Todd.

C. Moss, contra, cited *McMahon v. O'Neil*, 16 Gr. 579.

MR. HOLMESTED—The excuse for so great a delay as has taken place in this case is not, it must be confessed, a very satisfactory one. At the same time it does afford some explanation of the defendant's apparent laches which I do not think I can disregard, especially as I am satisfied that the defendant has satisfactorily made out that she has *prima facie* a good defence on the merits. If I were to preclude her from setting up that defence now I think I should be inflicting a very serious injustice upon her. I think the defendant is entitled to the order she asks, upon payment of the costs of noting bill *pro confesso* against her, and of the hearing, and reference before the Master, and also the costs of this application.

With regard to the latter, however, I do not think the plaintiff is entitled to recover the costs of the cross-examination of the defendants and others who made affidavits in support of the motion, nor yet the costs of so much of the affidavits of John Hossie and Idington as relate to the executions against Mrs. Cowston and her husband.

It has frequently been held at law, on similar motions to this, that affidavits cannot be read to disprove the merits of the defence alleged, and the cross-examination and the affidavits

which I disallow are directed to that end. It would, perhaps, be unsafe to lay down as an invariable rule that in no case on applications of this kind is a party to be entitled to cross-examine his adversary or his witnesses on affidavits made by them in support of such application. It is not, however, too much to say that such costs must not be incurred without consideration, and will not be allowed as a matter of course. In the present case the cross-examination has been had with a view to discredit the testimony of the defendants, and to disprove, if possible, the merits of the defence set up by the defendant, Jane Todd. The affidavits which I disallow are filed with the same object, but I think the plaintiff has failed to discredit the parties who were cross-examined, and the affidavits in answer to the merits are equally ineffectual to displace the defendants' case, even if they could be properly filed in answer to the merits set up by the defendant, which I do not think they could be. The object for which the costs in question have been incurred has wholly failed, and I do not think, therefore, the defendant can properly be charged with them.

The examination of the defendants and others before the Master, it is said, lasted for 26 hours, and over 120 folios of depositions have been taken. I do not think the plaintiff was justified in incurring this great expense.

The defendant, Jane Todd, must, of course, pay the costs of the creditors who have proved claims in the Master's Office.

This decision being appealed from, the appeal was heard on 27th April, 1874, by STRONG, V.C., who, on 14th May, 1874, gave judgment dismissing the appeal with costs, to be set off against the costs ordered to be paid by the order appealed from.

Order granted.

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DUNN V. MCLEAN.

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DUNN V. MCLEAN.

Restoring dismissed bill

A bill dismissed for want of prosecution will not be restored unless it can be shewn that the plaintiff's cause of suit will be lost by the dismissal.

Where an order directed that a better affidavit on production should be filed by the plaintiff within six weeks, and in default that the bill be dismissed,

Held, that upon default being made, an *ex parte* motion to dismiss was regular; notwithstanding that on the motion the fact was not disclosed that the hearing had, by consent, been postponed because the sittings for which the cause was set down were to be held before the expiration of the six weeks.

[May 8, 1874.—*Referee*. May 18.—*Strong, V. C.*]

On October 6th, 1873, an order for production was obtained by the defendant, A. G. McLean, against the plaintiff, who was resident in England, and in compliance with this order an affidavit was filed sworn on the 5th September, 1873, a date prior to the date of the order to produce. The affidavit was for this reason held insufficient, and on the 22nd October, 1873, an order was made in Chambers requiring the plaintiff to file a better affidavit within ten weeks from 6th October, 1873.

On the 13th Feb., 1874, the plaintiff filed a further affidavit, in which she referred to the documents in her possession as those set out in her affidavit made on the 5th September, 1873, but not in any other way identifying the affidavit referred to, as that which had been previously filed. On an application in Chambers this second affidavit was held insufficient, and an order was made on the 4th March, 1874, ordering a better affidavit to be filed in six weeks, and in default that the bill be dismissed. From this order the plaintiff appealed, but the order was affirmed on the 9th March, 1874.

The cause was set down to be heard at Toronto, at the sittings which commenced on the 24th March, 1874, but in consequence of the plaintiff's inability to file her affidavit on production before the sittings, the parties agreed to the hearing being postponed until the following autumn.

The plaintiff having failed to file her further affidavit on production, pursuant to the order of the 4th March, 1874, the defendant, A. G. McLean, applied in Chambers, *ex parte*, on the 21st April, 1874, and obtained an order dismissing the plaintiff's bill as against him.

On the 27th April, 1874, the plaintiff applied

in Chambers to set aside this order on the ground of the suppression of the fact that the hearing had been postponed, or by way of indulgence, and to reinstate the bill. Pending the motion the plaintiff's affidavit on production arrived from England and was forthwith filed, and it was accompanied by a letter from her English solicitors stating that it had been delayed in consequence of the absence of the plaintiff from London.

MR. HOLMESTED held that the order dismissing the bill was regular, but being of opinion that the delay in filing the affidavit had been excused, and considering that the costs incurred in the suit were considerable, and that the defendant having previously agreed to a postponement of the hearing until the autumn, could not be prejudiced in his defence, and that the cause would not be delayed by granting the application, ordered the bill to be reinstated upon payment of costs.

The defendant, A. G. McLean, (in person) appealed from this order. He cited *Burns v. Chisholm*, 2 Chy. Ch. 88; *Cook v. Davies*, 1 T. & R. 310; *Pearce v. Wrighton*, 24 Beav. 253; *Stevenson v. Mackay*, 24 Beav. 252; *Clarke v. Derby*, 10 Jur. 978; *Matthews v. Chichester*, 11 Jur. 49.

J. C. Hamilton, for the plaintiff, in support of the order cited *Re Howland*, 4 Chy. Ch. 6; *Vernon v. Vernon*, L. R. 6 Chy. 833; *Southampton v. Rawlins*, 13 W. R. 512; *Nicholson v. Peile*, 2 Beav. 497; *James v. Biou*, 3 Sw. 245.

STRONG, V. C.—There are some circumstances in this case which would form grounds for extending an indulgence to the plaintiff, but it is impossible to do so without treating as a nullity the order which has been obtained for the dismissal of the bill.

The only question upon which I had any doubt was whether the order dismissing the bill was properly made *ex parte* or whether notice should not have been given. *Burns v. Chisholm*, 2 Chy. Ch. 88, and *Cook v. Davies*, 1 T. & R. 310, have set at rest any doubts that I had on this question and shew that the order was properly made *ex parte*.

The order of the 4th of March directed an affidavit to be filed within a limited time, and in case it was not filed within that time the bill be dismissed. Upon a proper application the time for filing the affidavit might have been extended.

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No such application appears to have been made. In the meantime, however, between the orders of the 4th of March and the orders dismissing the bill the cause was struck out of the hearing list and one of the plaintiffs had submitted to examination.

Although the rule is to be conserved with care that a party coming for an order *ex parte* is bound to disclose all necessary circumstances, I cannot see that such a wholly collateral circumstance as the fact of the cause having been struck out of the paper was one which it was the duty of the plaintiff to communicate. The *ex parte* application was founded upon a former order and it would have been beyond the power of the Referee to have acted upon the circumstances disclosed. If they should have been disclosed in this case, then wherever a party has obtained an order like this and afterwards comes to the Court to have effect given to it on the ground of default, he would have to bring up the whole history of what has taken place in the interim. I do not think this should be done. The line must be drawn somewhere between what should and what should not be disclosed, and I think that the circumstances in this case, the non-disclosure of which is complained of, were wholly collateral.

Again, if I say that the Referee has properly restored the bill I should have to say that in every case where costs have been incurred the bill should be restored. The Court would be playing with its orders if it were to do so. It does not dismiss a bill one day to restore it the next, and it is only where the substantial rights of the parties are affected where the party would be met by the Statute of Limitations if he filed a new bill, or, at any rate, where there is something more material than a mere matter of costs that the Court will restore a bill. In this respect I do not agree with the Referee. His order, though proper in declaring there was no irregularity in obtaining the order *ex parte*, was erroneous in allowing the bill to be restored, and must be reversed.

Appeal allowed—Motion refused.

The plaintiff subsequently reheard the order of Strong, V. C., before the full Court, but the Court considering the case to be one for the exercise of discretion on the part of the Judge, refused to interfere.

RE PETTEE, MCKINLEY v. BEADLE.

Administration order.

A testator devised his real estate to two persons as his executors, but only one of them proved the will. An application, by a person claiming to be a legatee and creditor for an administration order was dismissed, the executor who had proved the will having alone been served with notice, and it not being shewn that the other executor, had renounced or disclaimed. It was also not shewn that the legacy to the applicant had vested, or that he was a creditor of the testator.

[May 11, 1874.—*Referee.*]

This was an application for an administration order. The applicant claimed to be interested, as assignee of a legatee named in the will of the testator, and also as having made advances for the maintenance of the testator's children, and for repairs effected and made on his real estate since his decease.

Watson (Blake, Kerr & Boyd), for the applicant.

R. Munro, for the executor, consented to an order being made.

MR. HOLMESTED.—The legacy of which the applicant claims to be the assignee, was contingent on the legatee's attaining twenty-one or marrying, and it is not shewn that either of these events has happened.

The advances do not constitute the applicant a creditor of the *testator*, and therefore he is not, I think, entitled under the General Orders to an administration order. See *Campbell v. Bell*, 16 Gr. 115; *Farhall v. Farhall*, L. R. 7 Chy. 123.

There is a further difficulty in the way of the applicant succeeding on this motion, and that is occasioned by the absence of necessary parties. It appears that the testator devised his estate to two executors and trustees, only one of them has taken out letters probate; it does not appear that the other has ever renounced or disclaimed. So far as the legal estate is concerned therefore, he would appear still to be a necessary party to an administration suit: *Walker v. Seligman*, L. R. 12 Eq. 152.

The motion therefore must be refused. There will be no costs, the executor who has been served having consented to the order going.

The applicant may apply again if he can supply the defects I have pointed out.

Chy. Cham.]

RE COOMBE ET AL. AND COCKBURN

[Chy. Cham.]

RE COOMBE ET AL. AND COCKBURN.

Arbitration—Making award order of Court—Agency.

The fact that a submission or award relative to personality is made out of the jurisdiction of the Court is no objection to its being made an order of Court.

[May 12, 1874.—*Referee.*]

This was a motion on behalf of Mr. Cockburn to make a submission and an award an order of this Court. Notice of the motion had been served on Messrs. Coombe & Campbell, the other parties to the submission, and they appeared by their solicitor and resisted the application. The submission was in the following terms:—

“Quebec, 5th August, 1873.

“George Cook, Esq., Quebec.

“Dear Sir—A dispute having occurred between us the undersigned concerning the river freight of sundry oak plank, &c., which you have kindly consented to adjust, we hereby promise to draw up each a written statement of the two sides of the case and deliver them to you simultaneously under seal; and further, we promise to abide by and to carry out your decision and to close the matter by payment of whatever sum you award and thus prevent litigation or further disputing,

“And remain, respectfully yours,

“(Signed) A. J. COOMBE, and

GEORGE CAMPBELL,

By John J. Bew, Agent.

“ ISAAC COCKBURN.

The award made in pursuance of this submission was dated at Quebec, and awarded that \$2028.44 be paid by Coombe to Cockburn, (Campbell's name being, by an error, omitted).

An affidavit of Mr. Cockburn was filed, in which he stated that Bew was in Coombe & Campbell's employment, and that he believed he had full power to sign the submission on behalf of his employers; but that fearing lest he might be injured with them if he made an affidavit to prove his authority he had refused to do so.

N. W. Hoyles, for the applicant, cited *Grant v. Eddy*, 21 Gr. 49; *Norris v. Chambres*, 29 Beav. 246; *Davis v. Park*, cited in *Hart v. Herwig*, L. R. 8 Chy. 862; and *Penn v. Lord Baltimore*, 2 W. & Tu. L. C. 923.

C. Moss, for Coombe & Campbell, cited *Aldington and Cheshire*, 15 C. B. N. S. 375, as to the proof of agency.

MR. HOLMESTED.—It was first contended that the agency of Bew was not proved. No affidavit is filed in answer to Mr. Cockburn's affidavit, and, uncontradicted as it is, I think I must hold Bew's authority to bind Coombe & Campbell sufficiently established.

In the next place it was said that the award not having directed Campbell to pay anything he should not have been made a party to this proceeding. He, however, is a party to the submission, and I think it was proper that he should be served. See *Aldington and Cheshire*, 15 C. B. N. S. 375.

The remaining point urged was that the submission and award being both made out of the jurisdiction of the Court there is no jurisdiction. On this point, however, I entertain no doubt. The contract which has been created between these parties is a contract relating to personality, and therefore can be enforced by the Court against either of the contractors if they come within the jurisdiction of the Court, and the rule being well established that although the contract is to be construed according to the *lex loci contractus*, yet the remedy to enforce it is to be governed by the *lex fori*, I see no reason why the submission and award should not be made an order of Court in the same manner as any other submission and award which is within the jurisdiction of the Court. Here both Coombe and Campbell have been served with notice of the motion within the jurisdiction of the Court, and looking at the nature of the submission and award I have no hesitation in saying that there is jurisdiction in this Court to enforce the award, and that therefore the submission and award should be made an order of this Court as prayed.

Order granted (a).

(a) See *Paget v. Ede*, L. R. 18 Eq. 118—REF.

Chy. Cham.]

RE ETTE—CAMPBELL V. EDWARDS.

[Chy. Cham.

RE ETTE.

Administration order.

An administrator is entitled *ex parte* to an administration order, where the liabilities of the estate exceed the assets

[June 8, 1874.—*Blake, V. C.*]

W. G. P. Cassels moved *ex parte* on behalf of *P. McCarthy*, administrator of the estate of the late *W. Hallett Ette*, for the ordinary administration order. The assets of the estate were shewn to be \$1,000 while the liabilities were \$4,000. He cited *Re Dunlevie*, (*Esten, V. C.*, 16 May, 1861,) as authority for making the motion *ex parte*.

BLAKE, V. C.; granted the order.

CAMPBELL V. EDWARDS.

Staying proceedings pending rehearing.

On motions to stay proceedings pending rehearing, the Court will follow the practice laid down in the Error and Appeal Act with reference to staying proceedings pending an appeal to the Court of Error and Appeal.

[June 15, 1874.—*Chancellor.*]

A decree had been made directing the defendant to pay to the plaintiff a large sum of money and costs. The defendant had set the case down for rehearing, and had given notice of rehearing.

J. S. Ewart, for defendant, now moved to stay proceedings pending the rehearing, offering to give the same security as would be required on an appeal to the Court of Error and Appeal.

He cited *Weir v. Matheson*, (unreported, decided by the late Chancellor *Vankoughnet*) ; *Winters v. Hamilton Permanent Building and Savings Society*, 1 Chy. Ch. 217; and *Stovel v. Coles*, 10 C. L. J. 342.

W. G. P. Cassels, contra. The English cases shew that the Court, looking upon a decree as binding until reversed, will direct the money to be paid over to the party declared by the decree to be entitled to it upon his giving security for its re-payment in case of a reversal of the decree. This is the practice most proper to be followed in this country where a high rate of interest can be obtained ; for a party might retain and use, pending the re-hearing, the money which the decree ordered him to pay, and as he would only,

if compelled to restore it, upon the decree being affirmed, have to pay interest at six per cent., he might actually make a profit by obtaining a higher rate of interest for the use of the money in the mean time ; and so parties would be encouraged to rehear and prolong litigation. The cases in England of *Gibbs v. Daniel*, 4 Giff. 41, 9 Jur. N. S. 632 ; *Merry v. Nickalls*, L. R. 8 Chy. Ch. 418, and the unreported cases of *Churcher v. Stanley*, (Mr. Taylor, 26th October, 1871) ; *Freehold Building Society v. Choate*, (Mr. Taylor, 13th November, 1871) ; and *Carradice v. Currie*, (Mr. Taylor, 5th February, 1871). In the case of appeals the Court has no discretion, the letter of the statute governing, but in the case of rehearing it has a discretion which is unfettered by the statute.

MR. HOLMESTED, after taking time to consider, said that as the cases were conflicting, and the practice therefore in an unsettled condition, he would direct the motion to be argued before a Judge.

The case was accordingly reargued on the 15th June, before the Chancellor.

SPRAGGE, C.—I am of opinion that a change was made by the Error and Appeal Act (Con. Stat. U. C. c. 13,) in the practice, with reference to staying proceedings under a decree while it remains questioned. The Legislature has thought fit to introduce the principle in such cases, that the decree is to be looked upon as not final until the Court of Appeal has decided whether it was right or wrong ; and I do not think that this principle is to be confined to cases of appeals to the Court of Error and Appeal, but is also applicable to rehearsings, the Act being a legislative declaration of what the rights of parties shall be under such circumstances. If this were not the case, the practice as to rehearsings would be anomalous. The defendant, in this case for instance, would have to pay over the money, but if upon rehearing the decree were reversed, and then the plaintiff appealed, the defendant could not obtain payment from the plaintiff, pending the appeal, in consequence of the statute. It is very true that the Court has, in rehearing cases, a discretion, as it is not bound by the letter of the Statute ; still this is not a capricious but a judicial discretion, which the Court is bound to exercise in accordance with the principle established by the Error and Appeal Act.

Order granted.

Chy. Cham.]

RE FOLLIS, KILBOURN, AND COULTER.

[Chy. Cham.

RE FOLLIS, KILBOURN V. COULTER.

Sale—Trustee purchasing—Con. Order 381—Fraud in tenders.

In an administration suit a sale by tender was ordered. The defendant J., who was the executor of the person whose estate was being administered, and also trustee for the sale of a portion of the land sold, procured four tenders, of different amounts, to be put in for the property, in the names of different persons but really for his own benefit. Every tender was for an amount less than the real value of the land. One of these tenders was accepted by the Master, and the person in whose name it was made, was declared the purchaser, and the sale to him confirmed. Subsequently he made a formal transfer to the defendant J.

Upon the application of the plaintiff the sale was set aside.

Held, also that the plaintiff was entitled to apply to set aside the sale without requiring any others of the parties interested to join.

[June 25, 1874—*Referee*.]

This was an administration suit in which certain lands belonging to the late Charles Follis's estate were sold in August, 1873, by tender, to one John Wilson, and the present application was to set that sale aside. It appeared that the executor Henry Johnston, who was also trustee for sale of fifty acres of the land sold, being desirous of purchasing the land in question consulted a Mr. Scott, and the latter caused four tenders to be put in, in different persons names but all of them, it clearly appeared were put in in the interest and for the benefit of the defendant Henry Johnston. One of these tenders was put in in Johnston's own name, a second in the name of Edward Coulter, his co-executor and trustee, a third in the name of John Wilson, and a fourth in the name of one Smith. There were four other tenders, but those of Smith and Wilson being the highest, and Smith not being considered a person of substance, the tender of Wilson, amounting to \$1,600, was accepted, and he was declared the purchaser and the sale to him was confirmed. Subsequently he formally transferred his interest to the defendant Johnston, who applied for and obtained an order for possession against the present applicant.

The defendant in his cross-examination admitted that the value of the land was about \$2,000.

W. G. P. Cassels, for the plaintiff. The sale is objected to on the ground that the defendant Johnston, being a trustee for sale of part of the lands, was incapacitated under Con. Order 381 from bidding, without a special order enabling him to do so; and because the sale to him was

made at a gross undervalue; and because he has been guilty of improper conduct in bringing about the sale. He cited *Crooks v. Crooks*, 2 Chy. Ch. 229.

T. S. Kennedy, on the same side, for the infants, cited *Spring v. Pride*, 12 W. R. 510; *Ingles v. Richards*, 28 Beav. 361; *Re Bloye's Trusts*, 1 M. & G. 488.

C. Moss, contra, for defendant Johnston.

MR. HOLMESTED.—I think that all the grounds of this application are fully made out, and that they are fatal to the validity of the sale.

In the first place I must hold that the defendant being a trustee for sale (although of only 50 of the 135 acres which have been sold) was nevertheless within the exception of the order 381, and was precluded from bidding. It is no answer to say that he had not the conduct of the sale, and that the sale took place under the direction of this Court. This is the argument that was addressed to the Court in *Geldard v. Randall*, 9 Jur., 1085, but without effect. That was an application on the part of an executor for leave to bid, and it was refused. In *Tenant v. Trenchard*, L. R. 4 Chy. 545, a similar application was made and was also refused, the Lord Chancellor observing, that "the authorities shew that the Court will set aside every sale out of Court to a trustee, and will further fix him with the price he proposed to give in the event of the property not fetching more upon a resale. The cases where liberty to bid has been refused are mostly cases of solicitors, the reason of the rule being that a solicitor must have acquired much information, and that the Court could feel no security that he would do his duty and communicate his information so as to raise the price, if he had a prospect of becoming the purchaser. But the reason of the rule applies to trustees as strongly as to solicitors." Here the property which was subject to the trust for sale has been sold along with other property, and it is impossible to distinguish between the two.

The evidence as to value is somewhat doubtful, but taking the defendant's own statement it is sufficiently clear that the lands have been sold at a considerable undervalue. The price at which the sale took place was \$1600, and certain arrears due to the Crown which brought up the price to about \$2000 in all. In his affidavit filed in answer to this motion the defendant stated that he considered this price was all that the land was worth, but on his cross-examination I observe

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RE FOLLIS, KILBOURN AND COULTER.

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that he says that he considers the place worth \$2000 over and above the amount due to the Crown, so that according to his own estimate he has bought the land for \$500 less than it was worth. The estimates, however, of the applicant and the persons who have made offers in support of the application place the value much higher, and according to their statements the land has brought from \$1000 to \$2000 less than its true value. Under the circumstances I think it clear that the sale must be set aside.

If the defendant Johnston had acted openly and straightforwardly and had bid under a *bona fide* mistake as to his rights I might have felt inclined to grant the application, without visiting him with costs. But I think his conduct has been such as to excite suspicion as to his *bona fides*. I do not understand the reason of several tenders being put in, in the names of others, but really in his interest, and no satisfactory explanation has been offered to me of that proceeding. It would appear to have been done for a fraudulent purpose, and it appears to me that an actual fraud was in fact perpetrated. It appeared, on opening the tenders, that Smith's tender was the highest, his tender being \$1700. Now Smith's tender was really the defendant Johnston's tender; but as there were no higher bids he suffers Smith's tender to be rejected on the ground that Smith was a person of no means, and falls back upon Wilson's tender which was a \$100 lower. The estate therefore has clearly lost \$100 by this mode of tendering even supposing the sale were not otherwise open to objection. Had there been no other tender for \$1600 it is clear he might have suffered Wilson's tender also to be

rejected, and have fallen back on a lower one still. Besides enabling the defendant to act in this fraudulent way, the fact that so many tenders were put in was calculated to deceive the Master and create the impression that the prices offered were the result of a fair competition between eight different persons, whereas in truth there were but four or five competing. It has been over and over again insisted that the greatest good faith is requisite in sales had under the decrees of this Court, and to allow such a transaction as this to stand would be acting in direct opposition to those principles which have been so well established.

There has been some delay, it is true, in making this application, but it has been explained sufficiently. I do not think it was necessary that the infant should join in the application, any party interested in the sale I think was entitled to apply without requiring any other person interested to join. See *Dance v. Goldingham*, L. R. 8 Chy. 902.

The sale must be set aside and a re-sale had, and the defendant Johnson must pay the costs of the application and of the re-sale. In the event of the property failing to bring as much on a resale, he must be held to his bargain. In the event of more being realized he will of course be entitled to be re-couped the amount which he has paid.

Order granted.

The lands were subsequently re-sold and realized \$2,740.

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ABERNETHY V. BEDDOME—McMASTER V. BEATTIE.

[C. L. Cham.

COMMON LAW CHAMBERS.

ABERNETHY V. BEDDOME.

Satisfaction piece—Signing before attorney in the United States.

Held, that signing a satisfaction piece before a practising attorney in the United States as attorney for the party signing is a sufficient compliance with R. G. 64.

[February 25, 1874.—*Mr. Dalton.*]

Flock (London) applied for an order to enter a satisfaction piece signed by the plaintiff in one of the United States in the presence of, and subscribed by, a practising attorney of that State upon the roll.

MR. DALTON.—I think that is a substantial compliance with R. G. 64, and will grant the order.

Order accordingly.

McMASTER V. BEATTIE.

Defence for time—Striking out false plea—34 Vict. cap. 12, sec. 8.

Held, that a plea pleaded merely for time, and admitted in a proceeding in the cause to be false in fact, will be struck out under 34 Vict. cap. 12, sec. 8, and leave given to sign final judgment.

[March 7, 1874.—*Mr. Dalton.*]

This suit was on a promissory note, and the plea, payment. The plaintiff joined issue on this plea, and then, under the Administration of Justice Act, obtained an order to examine one of the defendants. At the examination this defendant swore that the note had not been paid—that the defence was merely put in for time—and that he had given instructions to his attorney to put in the same defence for the other two defendants.

Under these circumstances the plaintiff obtained a summons to strike out the plea, and set

aside all subsequent proceedings, with costs against the defendants, on the ground that the plea was for the purpose of delay.

D. B. Read, Q. C., shewed cause. The Courts had no jurisdiction before the Administration of Justice Act to entertain an application of this sort, and that Act does not give them jurisdiction. There is no rule of law requiring pleadings to be verified by affidavit, except in cases of abatement, and allowing this application would be equivalent to introducing such a rule. The Courts have continually held that they will not try the truth of pleadings by affidavits on chamber applications : *Smith v. Backwell*, 4 Bing., 512; *Nutt v. Rush*, 4 Exch., 490; *Levy v. Railton*, 14 Q. B. N. S., 418; *Rawstorne v. Gandell*, 15 M. & W., 304; *Phillips v. Clagett*, 11 M. & W., 84; also Ch. Archbold's Practice, pp. 292—297, and *Gibson v. Winter*, 2 N. & M., 737. Section 8 of 34 Vict. cap. 12, under which this application is made, was intended only for the case provided for in the former part of the section ; that, namely, of several pleas being pleaded ; and the whole section should be read and construed together. Even if meant to apply to the case of a single plea, in this case the plaintiff having joined issue, and thus having admitted the plea to be a good one, cannot now come in and try to set it aside. As to the intention of the Administration of Justice Act in giving power to examine, the 24th, 25th, and 29th sections must be read together, and from them it is very evident that the examination is to have reference only to matters to come into question at the trial of the cause. If the Legislature did not mean this, why did it give the power to examine only after issue joined ? It will be a fraud on the statute, if it is turned to this use. The effect will be to do away with defences for time ; and although it may be a question whether this would not be a good thing, still the Court ought not to do so without the express direction of the Legislature, as it will create a very great change in the practice of the Court.

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J. K. Kerr, contra.—The plea is a fraud upon the Court, and ought not to be allowed to stand. Under the Common Law Procedure Act, sec. 119, there might perhaps be some doubt as to the propriety of striking out the plea, as that only gave power to strike out pleas “so framed” as to embarrass or delay. But the Common Law Procedure Amendment Act, 34 Vict. cap. 12, goes further, and gives power to strike out any plea upon the ground of embarrassment or delay, and thus extends to the whole plea, and not merely to its form. As to the rule before the Administration of Justice Act, that the Court would not decide as to the truth of pleadings regular in form previous to the trial, the reason was, that it might not be put to the trouble of deciding between conflicting affidavits, and also that there might be no temptation to a defendant to put in affidavits on which he would have no cross-examination. This does not now apply, as there are no conflicting affidavits, and the evidence is taken in the same way as at a trial. There always was at Common Law, irrespective of statutory enactments, a rule that the Court would strike out sham pleas, the only difficulty being the proving them to be sham : Ch. Arch. Prac., pp. 292–297, and the cases there cited ; *Gordon v. Hassard*, 9 Ir. C. L. Rep., appendix, 21 ; *Stokes v. Hartnett*, 10 Ir. C. L. Rep., appendix 20 ; *Bank v. Jordan*, 7 Ir. Jur. N. S., 28 ; *Leathly v. Carey*, 8 Ir. C. L. Rep., appendix, 1 ; *Nutt v. Rush*, 4 Exchequer, 490. As to their having pleaded over, this is a case of the discovery of new facts, and we have availed ourselves at the very earliest possible moment of the power of obtaining the information. The Legislature has not given this power until issue is joined, in order to prevent its being used as a means of discovering some defence, and also that it might not come to be used as a matter of course, and thus greatly enhance the expenses of a suit.

MR. DALTON.—This is an application to strike out the plea of the defendants, on the ground that it is false and merely for delay.

The action is against the maker and two endorsers of a promissory note. The plea by all the defendants is payment before action. Issue was joined by the plaintiff on the plea. Since then the plaintiff had caused the defendant, Beattie, the maker of the note, to be examined under the Administration of Justice Act of 1873, and this is his examination:—“I am one of the defendants. I made the promissory note sued on in this action for \$420. I made it in favor of Mr. Robbs. I think. I know that he

and O’Dwyer are endorsers on the note. I know that the plaintiffs are the holders of this note. I did not pay this note, nor did the other defendants, I gave instructions to defend this suit for all three defendants. The object of the defence is to gain time to pay the amount. The whole amount, \$420, and interest is still due from the defendants to the plaintiff.”

Upon this the plaintiff has moved to strike out the defendants’ plea as false and pleaded for delay, upon the admission of the defendant himself made in the suit.

I think I ought to make the summons absolute.

At one time, undoubtedly, it was considered that the Court had a jurisdiction to strike out the plea of a defendant, and allow the plaintiff to sign judgment where it manifestly appeared that the plea was false. *Richly v. Proone*, 1 B. & C. 286, was a case of this kind. There, to a declaration for use and occupation, the defendant pleaded that he had delivered certain named goods to the plaintiff as “satisfaction.” The plea was struck out, upon an affidavit that it was false—the defendant not filing any counter affidavit. I believe that this is not the law now, and that the Court at this day does not feel that it has jurisdiction to force the defendant to verify his plea by affidavit, or to try on affidavits the truth of the plea—the law having assigned a different tribunal for such trial. This was settled by *Merington v. Becket*, 2 B. & C. 81, and *Smith v. Backwell*, 4 Bing. 512. These cases have been followed ever since, and no doubt the result from the cases of the present law is correctly stated in Arch. Prac., 11th ed., 291, that “the Judge will not interfere and strike out a plea upon the mere ground of its being false, although the plaintiff swear that it is in every respect so.” Thus in *La Forest v. Langa*, 4 D. P. C. 642, a defendant pleaded that the bill sued on was outstanding in the hands of a third person, and upon affidavit that the plea was wholly false, and the production of a letter of the defendant in proof of it, in which the defendant requested from the plaintiff time for payment, it was said by Tindal, C. J., on a motion to strike out the plea,—“It is a plea upon which a distinct issue may be taken, and if we were to allow this rule, we should, in effect, be trying the case upon affidavit.”

All this relates to pleas on which a single issue may be taken, and the reason which runs through the cases is this alone, that to strike

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out such a plea is an assumption by the Court of the power to try on affidavit that which, by the law, is to be tried by jury.

But there is another class of cases, viz., those where, from the form or substance of the plea, a distinct and single issue cannot be taken, and in such cases it has always been the practice to strike out pleas manifestly false. The cases in 4 Ex. 490, and 14 Q. B. 418, are cases of this kind. The cases are numerous. A single instance will shew how far the Courts have gone, and how much the falsity of the plea has influenced the mind of the Court beyond all other considerations. In *Smith v. Hardy*, 8 Bing. 435, to debt on a judgment, the defendant pleaded a release under seal, which had been destroyed by accident. The Court allowed the plaintiff to sign judgment on an affidavit that the plea was false; but it will be observed that here the plea was good in form and substance.

The present case, as it seems to me, stands clear from all these. I am not asked to try the truth of the plea upon affidavit, and it is not necessary to say that I could act upon the most conclusive and indisputable evidence, out of the cause itself, of its falsity. As to two of the defendants, they are not active in the defence. The defendant Beattie alone instructed the defence: and in his examination in this suit he says, in effect, the defendants owe the plaintiff all he claims, that the plea is false to his knowledge, and was pleaded for delay. Then if I can look at this examination (and why should I not), what is there to try? And when we read of sham pleas, false in fact, what are such if this be not? All the difficulties which occur in such cases as I have cited seem to be removed by the fact that there is nothing left to try; and to allow the defendant to force the plaintiff to the expense and delay of proving at a trial that which the defendant himself asserts, in this cause, to be the truth, is to be passive where action is required, to allow the forms of law to be abused in the face of the Court, and that which was meant solely for a defendant's protection to be perverted to inflict the merest injustice upon the plaintiff.

The Irish cases I have been referred to show that the Courts there are much more ready to act in striking out a false plea than the Courts in England; indeed, they treat a plea that is plainly false as necessarily a sham plea.

I therefore make the summons absolute, to set aside the plea, and for leave to the plaintiff to sign final judgment.

Order accordingly.

ELMSLEY V. COSGRAVE.

Administration of Justice Act, 1873, sec. 24—Affidavit by clerk of attorney.

Held, that an affidavit by a managing clerk of attorney of party, applying for an order to examine under sec. 24 A. J. Act, is insufficient unless it states that he had some particular charge of the suit.

[March 10, 1874.—*Mr. Dalton.*]

Mr. Watson (Blake, Kerr & Boyd) applied for an order to examine defendants. The affidavit was made by the managing clerk in the office of the plaintiff's attorney, and contained the following clause: "I am familiar with all the proceedings taken in this suit."

MR. DALTON.—Although the clerk may be the agent of the party within the Act, I think the affidavit should state that he has particular charge of the suit, and the present affidavit must be amended before the order can be made.

Order refused.

MCCRUM V. FOLEY.

Administration of Justice Act, 1873—Amendment—Penal action.

Held, that a defect in notice of action, required to be given by Con. Stat. U. C., cap. 126, sec. 10, could not be amended under secs. 49 and 50 of the Administration of Justice Act, 1873,

[March 11, 1874.—*Mr. Dalton.*]

In this case the notice of action for a penalty against a magistrate which is required to be given by Con. Stat. U. C., cap. 126, sec. 10, stated that the writ would be issued in one of the Superior Courts, but it was, by mistake, issued in the other Court. Under these circumstances a summons was taken out to amend the notice under secs. 49 and 50 of the Administration of Justice Act.

Farewell (Whitby) shewed cause.

Osler supported the summons.

MR. DALTON.—I think that in these cases the Statutes has given defendants a right to have these forms strictly observed, and that the objection here cannot be said to be a merely formal one or such as the Administration of Justice Act intended to affect, and I must therefore discharge the summons.

Summons discharged.

C. L. Cham.] CARNEGIE v. TUER.—BRONN v. BLACKWELL—JACKSON v. RANDALL [C. L. Cham.

CARNEGIE v. TUER.

Insolvent Acts, 1864, 1869—Procedure under.

Held, that the Act of 1869 regulates the procedure, after its passage, in insolvency proceedings commenced under the Act of 1864, and consequently that the discharge of an insolvent, who had made an assignment under the Act of 1864, entitled "The Insolvent Act, 1869," was valid.

[March 31, 1874.—*Mr. Dalton.*]

A summons was obtained to set aside *fi. fas.* on the ground that the defendant had, since contracting the debt, made an assignment in insolvency and obtained a discharge.

Murdoch shewed cause.

Mr. Johnstone (Bull & McWilliams) contra.

The assignment had been made under the Act of 1864, and the discharge which was obtained subsequent to the Act of 1869 was entitled "The Insolvent Act, 1869."

MR. DALTON.—I think that I must make the summons absolute. The Act of 1869 was intended to regulate the proceedings in matters then pending under the former Act, and the discharge is rightly entitled and valid.

Order accordingly.

BROWN v. BLACKWELL.

Venue—Discrepancy between declaration filed and copy served—Setting aside notice of trial.

Held, that the fact of a different county being inserted as the venue in the copy of declaration served, is no ground for setting aside notice of trial for the County inserted as the venue in the declaration filed.

[April 7, 1874.—*Mr. Dalton.*]

In the declaration served in this case the venue was laid in the County of Huron. In the issue book the declaration stated the venue as of the County of Perth, and at the same time notice of trial was served for the Assizes for the latter county. The declaration filed laid the venue in Perth and it was by mistake that Huron was substituted in the copy served.

A summons was obtained to set aside the notice of trial.

J. K. Kerr shewed cause.

Mr. Small (Harrison Osler & Moss), contra.

MR. DALTON.—The declaration which is filed is the original and must govern, and the notice of trial is correct and cannot be set aside. The defendant is always at liberty to examine the pleadings which are filed and is allowed his costs for doing so. I must discharge the summons with costs.

Summons discharged.

JACKSON v. RANDALL.

Absconding debtor—Setting aside attachment—Intent of departure.

Held, that the question as to the intent with which a person, whose property has been seized under a writ of attachment left the Province, can be tried on affidavit, on an application to set aside the attachment,

[April 10, 1874.—*Wilson, J.*]

John B. Read, on the 30th March, obtained a summons for the defendant calling on the plaintiff, and the sheriff of the County of Waterloo, to shew cause why the fiat or order of the Judge at the County Court of the County of Waterloo, directing a writ of attachment to issue against the defendant, should not be set aside, and why the said writ and all proceedings thereon should not be set aside; and why the interpleader order made herein and all proceedings thereon should not be set aside, and the bond given to the sheriff, in pursuance of the interpleader order, be delivered up to be cancelled; and why the plaintiff should not pay the costs of this application, and the costs in and connected with the interpleader suit, on the ground that the defendant was not and is not an absconding debtor within the meaning of the statute; or why the defendant should not have ten days further time to put in special bail; or why all further proceedings herein and on the interpleader should not be stayed until the fifth day of next term on grounds disclosed on affidavits and papers filed.

Osler, for the plaintiff, shewed cause, and filed affidavits shewing that the defendant had resided in this province for the last fifteen years prior to the month of May, 1873; that he had taken the oath of allegiance and had become a naturalized subject of Her Majesty; that the defendant entered into partnership in 1863, with George Randall and Herbert Mar-

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shall Farr, as woollen manufacturers at Hespeler, and two years afterwards he conveyed his interest thereon to David Sovereign Bowlby ; that the defendant, on or about the 15th of January, acquired a twelfth interest in the said business from John Randall, which said share, it is said, was equal to \$9,000 in the capital stock of the company ; that during the summer of 1872 the firm met with losses to the extent of about \$60,000, and in December last past the balance of defendant's interest on the capital stock was equal only to \$2,654.69 ; that by later losses it is said the defendant's interest became entirely wiped out and of no value, and his co-partner had said they would pay a considerable sum of money to any one who would assume their position in, and the liabilities of the firm. The plaintiff also said he believed that the losses, or a large part of them, were contemplated by the said firm and by the defendant in the month of November, 1872, and that the defendant well knew before he left Canada in May, 1873, that the capital in the said firm was absorbed by losses, and that he was liable to be called upon to pay one-twelfth of the losses of the business, which would amount to a very large sum ; that in November, 1872, the defendant, holding promissory notes of the firm to the amount of about \$6,502 for money lent, took the notes of the firm in the name of his wife, in lieu of the former notes ; that the firm had sold its real estate and part of its machinery, at a loss of about \$30,000 ; that the wheat partnership transactions, out of which the claim on the action had arisen, were entered into between the plaintiff and defendant in November, 1872, and the plaintiff says he has no doubt that the arrangements made between the defendant and Farr, one of the firm heretofore mentioned, with respect to the notes given in the name of the firm to the defendant's wife were made to secure, if possible, the same in the event of loss in the wheat transactions with the plaintiff, as well as in the transactions of the other partnership ; that in the wheat transactions between plaintiff and defendant, the defendant, between December, 1872, and May, 1873, made promissory notes to the amount of \$52,500, which notes the plaintiff endorsed ; and at the time the defendant left Canada, in May, 1873, a sum of \$48,800 was owing by defendant and plaintiff to the Merchants' Bank, on notes for such wheat purchases which were made by plaintiff and endorsed by defendant, which liabilities became due between the 3rd and 24th of June last ; that after the latter part of February, 1873, when the great bulk of the wheat had been purchased, the prices de-

clined, and up to the latter end of April wheat continued to be quoted at prices which would have caused considerable loss if sales had been made. The price paid was \$1.28, with charges. Commission, &c., would have required \$1.45 to have been procured to have saved them from a loss ; and the plaintiff says he told the defendant before defendant left Canada, that he, the plaintiff, anticipated a loss to each of them of about \$2000, and it was within possibility that each of them might have lost \$8,000 or \$10,000 ; that George Randall, who went to Montreal to effect a sale of wheat, telegraphed he had been offered \$1.42 $\frac{1}{2}$, but plaintiff did not think it advisable to take it ; that in November last defendant being in the Province, called upon him to have losses settled, and defendant said he had not money to pay, and the plaintiff believed defendant put him off to gain time for removal of machinery of the other firm from the Province ; that defendant gave his note to plaintiff for his share of losses for \$2,559.35, and afterwards, the amount being found to be for too much, the plaintiff gave defendant his (plaintiff's) note for the excess, being \$102.76 ; that on the 7th of March last, being informed the machinery of the other firm was to be removed to the United States, and believing he would have no security for the said debt if it were removed, he got the writ of attachment sued out ; that the defendant, in February, 1873, having a mortgage for \$8,500, with interest at eight per cent., sold the mortgage in great haste, at a sacrifice, for cash, to prevent, as the plaintiff believes, the same from being made liable for the defendant's liabilities in the two firms before mentioned.

Osler contended that the intent with which the defendant left the Province could not be tried on affidavit ; that the defendant's residence was still in Ontario, and that he was only or had been for some time only temporarily absent, and that the facts showed that the defendant was really absconding from this Province, from his creditors, in May 1873, and that he really absconded again after the making of the note in question.

He referred to *Higgins v. Brady*, 10 U. C. L. J. 268 ; *Howland v. Roe*, 25 U. C. Q. B. 467 ; *Harr. C. L. P. A.* 477 ; *Taylor v. Nicholl*, 1 U. C. Q. B. 416 ; *Smith v. The Niagara Harbour and Dock Co.* 6 O. S. 555.

John B. Read supported the summons. The affidavits he relied on contradicted materially those filed for the plaintiff. He contended that it appeared the defendant was not indebted to

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the plaintiff in May, 1873, when he left the country ; that the wheat was not sold then, nor until on in the month of June ; that then the sale was for about \$1.31 in Montreal ; that the accounts were not finally settled, even on the plaintiffs showing, until the note was given in November last ; and when the defendant left the country then, he was returning to his home in the United States, to which he had removed in the previous May, and was not absconding from Canada ; that if the plaintiff's object was to get a lien on the machinery of the firm of Randall, Farr & Co., by suing out a writ of attachment for the amount of his alleged claim, he showed himself the defendant had not only lost the whole interest he had in that firm and in its property and assets, but that he was involved in liabilities to an extent beyond his interest as a partner ; that the interpleader proceedings were, therefore, unwarrantable, and the proceedings on the action could not have been honestly taken against the defendant ; that the defendant was entitled to be let in, not only to defend this action, but to defend it in the ordinary way, without being required to give special bail.

WILSON. J.—There may be reason to think the defendant left this country in May, 1873, because of the difficulties he apprehended from the embarrassments of the firm of Randall, Farr & Co., in which he had lately before that purchased a one-twelfth interest.

There is no reason to think he left for any apprehended difficulty from the wheat transactions which he had carried on in partnership with the plaintiff.

The sale in June was for \$1.31 a bushel, which caused a loss of about \$4,800. The price offered in Montreal after defendant had left the Province was \$1.42 $\frac{1}{2}$. If \$1.31 caused a loss of \$4,800 the rate of \$1.42 $\frac{1}{2}$ would have caused a loss of probably not so much as \$400. The plaintiff himself would not sell for the \$1.42 $\frac{1}{2}$ because he believed the price would advance. He certainly apprehended no loss at that time, or if he did he could not have thought it would be very large. The plaintiff, in his letter to the defendant of 27th of June last, says : "It turns out, as you say, that we made a big mistake in not taking the offer made for our wheat in May, as prices have ever since declined, and we must encounter a very heavy loss." Again, "I very much regret that you should have left me alone to work off the large venture. I have had anxiety enough to kill me. I am satisfied that if you had

been here, we should not have lost anything on our spring purchases. Your policy of selling first price offered would have carried, had you been here."

In *Smith v. The Niagara Harbour and Dock Co.*, 6 O. S. 555, the Chief Justice said, in giving judgment on an application like the present, "the defendant swears that he never did depart from Upper Canada with intent to defraud his creditors or to avoid process. We cannot try the question of his intention upon affidavits, if he departed at all. Then he swears that he never has been a *resident* of Upper Canada, but he should state the actual facts more in detail.

In *Taylor v. Nicholl*, 1 U. C. Q. B. 416, a person, a resident of Scotland, came to this province, where he was for four or five months arranging with respect to some property he was entitled to, and while here he gave a bond to pay the plaintiff £100 at a future day. He returned to Scotland soon after giving the bond and before it was due. The writ of attachment was set aside. Mr. Justice Jones said the defendant "was not an absconding or concealed debtor. He was not, at the time he left the country, a debtor at all."

Whether a person treated as an absconding debtor was a *resident* or not in Upper Canada, is a question from the decided cases which can be tried upon affidavit. Whether he left with the *intent* to defraud it is said, as before mentioned, cannot be so tried.

The Courts in England generally, unless in very plain cases, always refused to try upon affidavit under the old statute of 12 Geo. I, cap. 29, whether the defendant was *indebted* as sworn to. Sir William Jared Evans, in the third volume of his Statutes, p. 105, in the notes, says, "There is a common cant maxim that the Courts cannot try the cause upon affidavits, which, like many other cant maxims, has an imposing sound, with but very little meaning, &c." The very fact that the court would interfere in some cases goes far, in my opinion, to shew that they might, with much advantage, have interposed in all cases. The 1 & 2 Vict., cap. 110, now expressly authorizes it. And C. S. U. C. cap. 22, sec. 31, is in accordance with it.

In England the statute does not, as in C. S. U. C., cap. 24, sec. 5, require the party to shew that the defendant is about to depart from this country with intent to defraud. Our Legislature, with respect to this allegation, has been very

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varying. I presume the 12 Geo. I, cap. 29, regulated the form of the affidavit to be made in this Province, to hold the defendant to bail, in which the mere fact of the defendant being *indebted* in a particular sum was all that was stated until we altered it by our own legislation. Our first enactment was the 34 Geo. III., cap. 2, sec. 6, which required the further facts that the defendant *verily believed* the defendant was about to leave the Province, and with an intent to defraud his creditors, to be also stated.

By the 38 Geo. III., cap. 6, sec. 1, it was recited that "many persons * * have fraudulently left the same [the Province] before their creditors can have sufficient knowledge of their intention so as safely to make the affidavit by the said act required." The defendant was thereon merely required to state that he was *apprehensive* the defendant would leave the Province without paying the debt, and the statement of the intent was dispensed with.

By the 51 Geo. III., cap. 3, sec. 2, it was enacted, the deponent should state that he *verily believed* the defendant was about to leave the Province, and with the intent to defraud his creditors. By the 2 Geo. IV., cap. 1, sec. 8, after reciting that much inconvenience is felt by conscientious creditors * * from the difficulty of ascertaining whether any persons design leaving the Province with an intent to defraud their creditors," it required the deponent to state that he was *apprehensive* the defendant would leave the Province without satisfying the debt, and it abolished the clause as to the intent, but required it to be stated that the "process is not sued for any vexatious or malicious motive whatever."

The 19 Vic., cap. 43, sec. 23, abolished the clause that the process was not sued out vexatiously or maliciously, and required it to be stated that the deponent "*hath good reason to believe, and doth verily believe*" that the defendant is immediately about to leave Upper Canada, and it re-enacted the allegation "with intent and design to defraud."

The C. S. U. C. cap. 24, sec. 5, requires that the affidavit shall shew to the satisfaction of the Court or a Judge—1. The course of action; and 2. Such facts and circumstances as satisfy the Judge: that there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Canada with intent to defraud his creditors, or the plaintiff in particular.

While there has been a change backward and forward as to the allegation of an intent to defraud, the phraseology as to leaving the country has been altered no less than six different times. There is no decision of our Courts that the defendant could contest on counter affidavits the allegation of his leaving the Province—or of the intent to defraud—and probably it could not have been done more successfully than the averment of the existence of a debt could have been questioned, because (whether the reason be satisfactory or not) the statutes authorized the arrest upon the party making the affidavit of these facts..

The Absconding Debtor's Act states a condition of things which must exist before a person *shall be deemed* an absconding debtor.—

1. He must be a person *resident* in Upper Canada.
2. He must be *indebted* to some other person.
3. He must *depart* from Upper Canada, and
4. He must depart with *intent to defraud* his creditors.

Where an affidavit is made that *any such person* so departing is indebted process may issue against him.

It has been decided that the question of *residence* may be tried on application like the present; and I presume also, as of course, the fact of *departure*; and if so, it appears to me to follow that the *intent* may be tried also.

Logically, the fact of the debt should be liable too, and in a plain case, it may be, as it was even under the old law and cases applicable to arrest.

I see here the fact that in May, 1873, the defendant left the Province with his family openly, and to the knowledge of the plaintiff and of the people in the village where he lived. His furniture was publicly advertised and sold. The plaintiff corresponded with him in his new abode in the State of Vermont.

The wheat purchased as partnership property was not then sold. It was not believed by either party, and certainly not by the plaintiff, there would be any loss upon it. A sale could have been made very soon after the defendant left the Province, which would have made the loss comparatively small. The plaintiff refused on the sound and fair exercise of his judgment to take the price offered, as it unfortunately turned out, and afterwards prices fell rapidly, and the loss instead of being about four hundred dollars, ex-

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ceeded four thousand dollars; but that was an unforeseen and unexpected result to them both.

The plaintiff could not have believed in May, when the defendant left the Province, that he was absconding from his creditors: nor for a considerable time afterwards. He could not have believed he was absconding from him, the plaintiff, as a creditor, for there was then no debt due to the plaintiff, nor was it believed there ever would be. It was a misfortune in business that one afterwards accrued and fell due. The fact of the defendant returning here in November, when he gave the note now sued on to the plaintiff, and so for the first time established a legal debt against himself, in favour of the plaintiff, and of his going back again immediately afterwards to Vermont, to which he had before removed, did not, for anything I see, constitute him an absconding debtor.

The case of *Lamond v. Eiffe*, 3 Q. B. 910, shews that the English Statute as to arrests was rigidly construed by holding that a debtor in England who had come from France, where he had put his children to school, and who was on his return to Ireland, where he resided at the time of his arrest, was a person liable to be arrested because he was a debtor, and was about to quit England, although he was only returning to his own home. But the facts of the two cases differ very much, as do also the provisions of the enactments.

If the fact of departure can be tried, and it is said in 6 O. S. 555 it can be, I do not see why the intent of the departure may not also be tried. The writ is not to issue because the defendant has departed the Province, as in *Lamond v. Eiffe*, 3 Q. B. 910, but because he has departed with intent to defraud; and to refuse relief on the ground that the Court will not or cannot try the intent is to give up one of the privileges of the Court—the protection and summary relief of those who are injured by an abuse of the process of the Court.

There is no difficulty in the Court trying whether a merchant, or bank manager, or railway director, of good reputation, standing, and credit, who has left for New York or for England on business or financial engagements, and who has left his family here, and whose whole property or means of business or livelihood are here, and who has plainly provided for only a temporary absence, who happens to be indebted to another in a few hundreds of dollars, and who is well able to pay the demand, has so

departed with the intent to defraud his creditors or not. That the mere fact of departure of such a person from the Province can authorize a reckless or ill-disposed creditor to treat him as an absconding debtor is scarcely to be tolerated; and that the Court is to sit idly by and know all this to be done by virtue of its own process, and yet be powerless to help, is not easy to believe.

I know the case which I have put is a plain one, but it tests the rule which it is said must exclude relief in every case. I know there should not be such a rule, and I am not inclined to believe there can be one. But I firmly believe the Court, and a Judge particularly, should be cautious as to all interference with the rights of a creditor, for the abuse of which he is specially answerable to the party injured, unless the cause for such interference be well established and it would be a denial of justice not to interpose.

In this case I think the defendant should be relieved as he asks. He was not a debtor to the plaintiff when he left the Province; he was not an absconding debtor; he did not leave it with the intent to defraud—certainly not to defraud the plaintiff,—and I do not know what creditors there may be of the firm of Randall, Farr & Co., or that any of them believe the defendant was absconding from them.

I do not see either of what service this process can be to the plaintiff if, on his own shewing, he has proved the defendant has lost the whole of his share or interest in the firm of Randall, Farr & Co., and that the defendant can have no beneficial interest in the property and assets of that firm as against their creditors. The attachment which he issued to take a portion of that partnership property, and which the partnership creditors must be entitled to take in preference to him, can be of no benefit to him. And he still maintains that right when, if he did not know it when he began his suit, and I think he did not, he has since discovered that it will take all the property of the firm of Randall, Farr & Co., including the portion of it which he has specially attached to pay their own special creditors.

I think I must order that the writ of attachment do stand as ordinary process, to which the defendant must enter a common appearance; and that the seizure of goods under it must be abandoned and the goods delivered up to the person or custody from whom or from which they were taken; and that the order for the

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trial of an interpleader issue and all proceedings had thereon be set aside; and that the plaintiff do pay to the defendant the costs of this application; and that he do also pay to the said sheriff of Waterloo the costs of executing the said writ of attachment and all costs of his obtaining the interpleader order, and all other costs incurred by him in the premises, and of opposing this application; and that the defendant be restrained from bringing any action against the said sheriff or against the plaintiff, for or in respect of any of the said matters.

*Order accordingly.**

DICKENSON v. HARVEY.

Sheriff—Suggestion of death on roll—Who entitled to execution.

Held, that upon the death of a sheriff who had recovered judgment in an action on notes seized under a *ji. fa.* his personal representative, and not his successor in office, is entitled to execution.

[April 28, 1874.—*Mr. Dalton.*]

The plaintiff in this suit was a sheriff who sued on notes seized under a *ji. fa.* and recovered judgment. After such judgment the sheriff died, and a summons was obtained to enter a suggestion of his death on the roll, and that his successor or personal representative was entitled to execution.

Mr. Killam (Richards & Smith) moved the summons absolute.

No cause was shewn.

MR. DALTON.—The difficulty in this matter is to decide who is entitled to execution—the sheriff's successor in office or his personal representative. Although 27-28 Vict., cap. 28, sec. 49, and 32 Vict., cap. 25, secs. 1, 2, and 3, are very strong as to the right of the successor to occupy the place of the dying or retiring sheriff, I do not think they apply to such a case as this, and the ordinary rule must govern. I will make the order awarding execution to the personal representative.

Order accordingly.

SPEERS v. GREAT WESTERN R. W. Co.

Postponing trial—Personal injuries—Inability to calculate damages.

Held, that the inability properly to calculate the damages to the plaintiff from a personal injury, owing to a sufficient time not having elapsed from the receipt of the injury, is a sufficient ground for postponing the trial.

[May 2, 1874.—*Mr. Dalton.*]

The plaintiff was injured by an accident on the defendant's railway. The defendants did not dispute their liability—the only question being as to the amount of damages.

The defendants obtained a summons to postpone the trial until the Fall Assizes, putting in affidavits from medical men shewing that from the recent date of the accident and the nature of the injuries received it would be impossible to tell whether the injuries would be permanent, and thus properly to assess the damages.

J. F. Smith shewed cause.

Mr. Boultbee (Barker) contra.

MR. DALTON.—I am unable to find any authority for postponing a trial upon the ground taken in this application, but I think the substantial justice of the case requires such an order to be made; but to prevent any hardship to the plaintiff in the meantime, I will impose upon the defendants the condition of paying into Court one thousand dollars as upon a plea of payment into Court.

Order accordingly.

TAYLOR v. GRAND TRUNK R. W. Co.

Stay of proceedings—Leave to amend within a certain time.

Held, that where, in an order to join issue and demur, leave is granted to amend within a certain time, without any express stay of proceedings, such leave operates as a stay until the expiration of such time.

[May 16, 1874.—*Mr. Dalton.*]

In this case an order was made giving leave to join issue and demur, and in the same order leave to amend within a certain time was granted without any mention of staying proceedings. Before the time for amending had expired a joinder and demurrer were filed and served. A

* In Easter Term a rule *nisi* of the Court of Common Pleas to set aside this order was discharged with costs: 24 C.P. 87.—*Rep.*

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summons having been obtained to set aside this joinder and demurrer,

Osler shewed cause.

Roaf contra.

MR. DALTON.—Although no express stay of proceedings is mentioned in the order it operates as such until the time to amend expires; as otherwise, if the party elects to amend he will then have to apply to set aside any pleadings that have been filed in the interval. I must make the summons absolute.

Order accordingly.

BENNETT v. TREGENT.

Setting off judgment and costs—Costs of the day—Personal undertaking of attorney.

Held, that a judgment purchased by defendant from a third party cannot be set off against the costs of the day, given to the plaintiff upon an application to postpone the trial, secured by the personal undertaking of the defendant's attorney to pay these costs, and upon which the plaintiff's attorney has a lien.

[May 29, 1874.—*Gwynne, J.*]

Last Fall the defendant applied to put off the trial in consequence of the absence of witnesses. The Judge was prepared to make the order upon payment of the costs of the application and the costs of the day. As the following day was commission day, the defendant's attorney offered to give his undertaking to pay these costs to save the expense of entering the record, and the order was made upon such undertaking. Afterwards the defendant bought a judgment of a third party against the plaintiff, and had the same assigned to him, and now sought by this summons to set off this judgment against the plaintiff's costs of the day. The plaintiff's attorney put in an affidavit shewing that his costs against his client in this cause exceeded the costs taxed.

J. B. Read shewed cause. The principle of set off does not apply in such a case as this where there is a personal undertaking by the attorney as to part of the costs. Even if it did apply generally, in this particular case it cannot, as the plaintiff's attorney has a lien upon the amount for his whole costs of the suit, and a right to apply the money secured by the defen-

dant's attorney's undertaking in payment of them.

McGregor, contra. The defendant is entitled to have these judgments set off against one another, and, even if the attorney has a lien, a great part of the costs of the day consisted of witness fees which were paid by the plaintiff, and as to which, at least, a set off should be allowed.

Gwynne, J.—The ordinary order upon putting off a trial and the one which, but for the personal undertaking of the defendant's attorney, would have been made in this case would have been that the trial should have been put off only upon payment of costs. In that case the costs must first have been paid, and then this question of set off could not have arisen. The defendant not being prepared to pay the costs upon the spot, his attorney intervened, and upon the credit of his own personal undertaking to pay the costs of the day when taxed, obtained for his client the indulgence which the defendant was not in a position to obtain for himself. Under these circumstances the credit being given to the personal undertaking of the attorney it may be argued with much force that the doctrine of set off of judgments and costs between the parties to the suit does not apply, and that this therefore is not a proper case for the intervention of the equitable jurisdiction of the Court. But not to regard the matter in this strict view, the defendant can claim no more favorable consideration than he could if the order had been, not that the trial should be put off upon payment of costs, but that it should be put off and that the defendant should pay to the plaintiff the costs of the day when taxed, upon which order judgment might have been entered against the defendant.

Now, the general rule of the Court applicable to the case is that no set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the *particular suit* against which the set off is sought. The question now seems to be, should I, in the exercise of the equitable jurisdiction of the Court, confine the attorney's claim for a lien upon these costs so ordered to be paid by the defendant to the plaintiff to so much of the costs of the day as consist of attorney's fees as distinguished from disbursements paid by the client himself, while in the particular suit in which the costs are awarded other fees exceeding the amount of the costs of the day are due to the attorney. If I should do so, and it seems to me that I could only do so upon

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the principle that the order for the costs of the day is to be regarded in the light of a wholly separate and distinct suit from the suit in the progress of which the order was made. I do not, under the circumstances, think that this is a case which calls for the exercise of the equitable jurisdiction of the Court in favor of the defendant.

Summons discharged.

GRIFFITH V. GRIFFITH.

Equitable plea—Set-off—Embarrassment—Striking out.

Held, that an equitable plea to an action upon a promissory note, that the plaintiff had covenanted to pay defendant's debts, which covenant he had broken, whereby the defendant was damaged to an amount equal to the amount of the note sued upon, is bad, and will be struck out as embarrassing.

[June 2, 1874.—*Gwynne, J.*]

Declaration on a promissory note by payee against maker. Plea, upon equitable grounds, that by a certain deed the plaintiff covenanted with the defendant to pay all the defendant's debts, including, among others, a certain debt then due by the defendant to the corporation of the city of Toronto for taxes, equal in amount to the note sued on: that the defendant had wrongfully neglected to pay the taxes, and that in consequence of such neglect the defendant's goods had been seized and levied upon to an amount equal in value to the note sued on, and that in equity the plaintiff should be restrained from prosecuting his claim upon the note until he should pay the said taxes, or until the defendant's goods should be released.

J. B. Read shewed cause.

W. R. Miller contra.

Gwynne, J.—The plea does not appear to me to be, properly speaking, a defence upon equitable grounds to the defendant's action. The defendant appears to be clearly liable upon his promissory note, indeed its payment may be the means to which the plaintiff looks to pay the claim for which the defendant's goods have been seized. What the defendant sets up is not a debt by way of equitable set-off due from plaintiff to defendant; but he says the plaintiff has, for valuable consideration, covenanted to indem-

nify him against certain debts due by the defendant, and among such the claim for which the goods have been seized, and the equitable relief which the defendant would be entitled to under the circumstances would be specific performance of the covenant to indemnify, together with compensation in damages, if any were sustained by him by reason of the alleged breach of the covenant in the seizure of the goods. I do not see any necessary or proper connection between that equity and the defendant's legal liability which would entitle the defendant to be released from the payment of his note in whole or in part, nor do I think that the objects which the Legislature had in view when passing the 36 Vict., cap. 8, sec. 3, was to enable a defendant to convert an action against himself for the breach of his promise to pay his note into a bill by him against the plaintiff for the specific performance of an wholly independent contract. This plea must, therefore be set aside as embarrassing, equally since, as it would have been before, the passing of 36 Vict., cap. 8.

Order accordingly.

THOMAS V. HALL.

Setting aside ca. sa.—Discharge of defendant under Insolvent Act—A barber not a "trader"—No assets—Intention to defraud a creditor.

Held, that a barber is not a trader within the Insolvent Act, 1869.

Held, also, that an assignment made by a person with no assets for the assignment to take effect upon, and for the purpose of defeating a creditor who was at the time suing such person, is fraudulent, and a discharge in such insolvency proceedings is void.

Semble, a voluntary assignment without assets is void.

[June 5, 1874.—*Gwynne, J.*]

In this case a summons was obtained to set aside a *ca. sa.* and cancel the bail bond.

Roaf shewed cause, citing *Harman v. Clarkson*, 22 U. C. C. P. 292; *Groves v. McArdle*, 33 U. C. Q. B. 258; *Ex parte Maginnis*, 1 Rose 84; *Ex parte Patterson, In re Bryant*, 1 Rose 402.

Osler, contra, cited *In re Thomas*, 15 Grant 169, and *In re Brett*, mentioned in the last case, but unreported.

The facts of the case appear in the judgment of

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Gwynne, J.—The defendant being sued in this action, executed, on the 30th September, 1873, a deed of that date, purporting to be a voluntary assignment under the Insolvent Act of 1869 to one Edward Major, official assignee in and for the County of Ontario. Professing to act under this deed the official assignee on the 3rd October, 1873, advertised a meeting of creditors to be held on the 17th October to receive a statement of the insolvent's affairs, and to appoint an assignee. Appended to the notice was the following note :—“The creditors holding direct claims and indirect claims maturing before the meeting for \$100 each, and upwards, are as follows :—William H. Thomas claims to have, and has sued for as assignee, a large sum alleged to be due him, to wit, \$1500, but which amount and all liability therefor the said insolvent disputes, and is defending the suit with the object of shewing that he is not liable to pay same.”

Upon the 17th October the defendant and Major met, but no creditor appearing, Hall made oath before Major, wherein he deposed to the effect that he had carefully examined into his affairs, and that to the best of his knowledge, information and belief, according to his books, the statement and schedule hereunto annexed, marked “A,” was correct, and did contain a true and correct list of his liabilities ; and further, that the papers hereunto annexed, marked “B,” contained a true statement of his assets, both real and personal. In the paper marked “A” the defendant represented that he had no liabilities whatever, direct or indirect, except for the claim of the above plaintiff in this suit, which was scheduled without any amount being named as a claim “alleged to be due to the said assignee by the said insolvent on account of certain goods bought by him from said Fitchett, but which liability the insolvent disputes.”

In the schedule “B” he represented that he had no real estate, and “no personal estate but what was covered by the Statute of Limitations;” by which I understand him to have meant that he had no personal assets whatever, unless claims which were barred by the Statute of Limitations, and from an examination of the defendant laid before me on this application it does not appear that he had even any assets coming within the above designation.

On the 22nd October, 1873, the plaintiff recovered judgment in the above action against the defendant for the sum of \$1270 damages, and \$51 costs.

On the 26th November, 1873, the defendant and the assignee met again at the town of Whitby, when no creditors having appeared, the assignee and the defendant signed a minute in the following terms :—“Insolvent Act of 1869. In the matter of John James Hall, an insolvent. A meeting of creditors having been duly called by advertisement and otherwise, as required by said Act, to be held at the law office of Messrs. Greenwood & McMillan, at the town of Whitby, in the County of Ontario, this 26th day of November, A.D., 1873, at 3 o'clock p.m., for the examination of said insolvent, and ordering his affairs generally, the said insolvent duly appeared thereat, but no creditors appeared, and no claims were filed herein, and on which account no formal examination of said insolvent was entered into, said insolvent stating that he was driven to take advantage of the provisions of the said Act on account of an alleged claim made by one William H. Thomas, of Oshawa, of about \$1500, and which said insolvent had no means of paying.”

The plaintiff having in the month of April, obtained an order for a writ of *capias ad satisfaciendum* to issue, whereupon the defendant was arrested and gave bail, the defendant obtained a summons calling upon the plaintiff, among other things, to shew cause why the defendant should not be discharged out of custody and the bail bond be delivered up to be cancelled, upon the ground that when the affidavits on which the said order was granted were made the said defendant did not, and does not now intend to defraud the plaintiff or his creditors, and had not made any secret or fraudulent disposition of his property in order to prevent its being taken in execution, and on the ground that when the said order was made and the said writ issued and for a long time previous the defendant was an insolvent under the Insolvent Act of 1869, and on grounds disclosed in affidavits and papers filed.

By the affidavits and papers filed on behalf of, and in opposition to this application it appears by defendant's own shewing, that for nearly ten years prior to the execution of the deed of the 30th September, 1873, the defendant had carried on the business of a barber, and that for the last three of those years he had carried on no other business ; that at the date of the assignment he was engaged in no other business ; that in December, 1872, he had sold his barber's business to one Pethick, for \$100, and went out of business. The defendant says, that before this

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sale he had sold perfume and hair oil in connection with his business. He further says that he again bought back the business from Pethick, who, at the time of the sale to him, appears to have been leaving the business with defendant, and that he paid him \$150; that he bought no perfumery from Pethick, nor does it appear that at this time he purchased perfumery from any other person, and he says that on the 30th of September he was out of perfumery, except a few bottles on hand. The defendant says that when he sold out the barber's business to Pethick in December, he purchased from Fitchett a stock of tobacco, which, immediately after, he sold in parcels, chiefly to one Clarke, and by certain proceedings in an interpleader suit between Clarke, claimant, and one Marshall, execution creditor of the above named Fitchett, whose assignee Thomas is. It seems that the goods which were the subject of that interpleader suit, were held to be the property of Fitchett as against Clarke, and it is, as I understand, for the value of so much of the goods as Hall professed to have purchased from Fitchett, and which had not been the subject of the interpleader suit between Clarke and Marshall that this action was brought, but for which goods the defendant alleges he had paid in full.

On the argument before me the defendants claim to be discharged from the operation of the *ca. sa.* was rested upon his business as a barber, and the allegation that he sold perfumery in connection therewith, and the operation of the execution of the deed of the 30th September, 1873.

It was contended upon behalf of the defendant that the fact that the defendant had no assets whatever, whereupon the deed of the 30th September could attach, did not prevent the assignment from operating as a good, valid, and effectual assignment under the Insolvent Act for the benefit of creditors, by virtue of which the defendant, by mere lapse of time, would become entitled to his discharge under the Act, and *In re Brett*, an unreported case before the late Judge Harrison, and *In re Thomas* before the late Chancellor Van-Koughnet, reported in 15 Grant 196, were cited as establishing this doctrine. The report in *In re Thomas* is very meagre. It does not state upon what ground the decision proceeded. The Chancellor is merely reported to have held that "the want of assets was not in itself a sufficient reason for refusing the discharge." In the argument in that case it was said that the late Judge Harri-

son had, in the County Court, so held in *In re Brett*, upon the ground that the Act then in force applied to all persons, whether traders or not. If this be the ground upon which these decisions are to be supported they would seem to be no longer binding authorities since the passing of the Insolvent Act of 1869, which applies to traders only, although I cannot see how a debtor, being a trader or not a trader, can make any difference. I can well understand that it should be held, inasmuch as the Insolvent Act passes, under a voluntary assignment to the assignee, not only what real and personal estate the insolvent then had, but also whatever should, in any way, come to or devolve upon him before obtaining his discharge, that the mere fact of the insolvent not having assets at the date of the assignment should not avoid the assignment; but I must confess that to hold when an insolvent comes for his discharge upon a voluntary assignment, that he should be entitled to it, notwithstanding that at the time of the execution of the assignment he had no assets whatever, nor any expectation of any, nor had since acquired or possessed any whereon the assignment could attach, and so had, in fact, given up nothing to his creditors, appears to me to be a perfect mockery of the Insolvent Act. An assignment executed under such circumstances seems to me to afford the strongest proof that it was not made *bonâ fide*, but was made in fraud of the Insolvent Act. The language of Lord Westbury, in *Ex parte Morrison, In re Clunn*, 10 Jur. N. S. 787, seems to me to express the only terms in which such a transaction can be properly characterized. There a trust deed was executed under 24 & 25 Vic. ch. 134, sec. 192, the party executing it having no assets, and it was contended that the fact that the party executing the deed had no assets did not vitiate the deed. The Lord Chancellor says: "This is a fraudulent attempt to accomplish the release of the debtor by the assistance of the Act of Parliament. I have been told by counsel that many such things have been done—that many such deeds have been executed. If so, I wish it to be understood that whenever a similar fraudulent attempt to abuse the provisions of the Act of Parliament is brought before me, I shall not be slow in applying the remedy."

It is one thing to hold that a debtor made an insolvent in compulsory liquidation who may have no assets, may become entitled to his discharge, and quite a different thing to hold that a man who may perhaps have wastefully squandered all his estate in wanton extravagance may

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laugh at his creditors, and become entitled to his discharge whether they consent or not, by the mere lapse of a year after he has derisively handed them a deed which, in so far as their interests were concerned, was wholly inoperative by reason of his never having any estate whereon it could attach.

In the present case I might rest my decision, refusing to relieve the defendant from the operation of the *ca. sa.*, upon the ground that a barber is not a trader, as I think he is not within the Insolvent Act, and that the evidence fails to satisfy me that the defendant was a trader, by reason of the sale of perfumery relied upon. The evidence upon that head upon the contrary satisfies me that the sale of perfumery was merely incidental to the business of barber, and was not of a character to entitle the defendant to be regarded as a trader in respect thereof. The alleged purchase of the goods from Fitchett, in December, 1872, and the sale thereof by the defendant immediately afterwards was not much relied upon by defendant's counsel, and indeed could not have been. That was not only an isolated transaction terminated long previous to the execution of the deed of the 30th September, 1873, but it bears moreover the appearance of a fraudulent contrivance between Fitchett and the defendant rather than of the *bona fide* exercise of any trade at all by the defendant. But I prefer chiefly to rest my decision upon the ground that the evidence satisfies my mind that the assignment was not executed *bona fide*, but was a fraudulent device contrived for the express purpose of defeating the plaintiff's recovery by a fraudulent abuse of the provisions of the Insolvent Act. The plaintiff had, in my opinion, abundant reason for applying for an order to arrest the defendant, and had good grounds for the apprehension that the defendant would leave the Province with intent to defraud the plaintiff, if his fraudulent contrivance for getting discharged under the Insolvent Act should fail; nor was he, I think, without good grounds for suspecting that defendant had made away with property to prevent the plaintiff reaching it.

I cannot, I must say, understand how any respectable gentleman filling the office of official assignee could be got to assist the defendant in the perpetration of this fraud. The debtor's expressed intention is to defeat the plaintiff. He denies that he owes the claim sued for, and he professes to have been able to have defeated the recovery by evidence. He has no other creditor, and having, as he says, no assets, real or personal, he conceives

that the easiest mode of defeating the plaintiff will be to make an assignment of all his property, having none, for the benefit of his creditors, of whom, according to his own statement, he has none; and he finds an assignee accommodating enough to accept that nugatory assignment. Now that an assignee should at his own expense assume the duties of assignee for the benefit of the debtor under such circumstances seems incredible, and if the assignee takes money in advance from the debtor, or security for money to recompense him for his services it will be well for him to reflect that he is under the summary jurisdiction of the court, which could not fail to regard the acceptance of money under such circumstances as a very grave fraud; and it will be found, when the case arises, that the arm of the law is sufficiently long to reach, and strong enough to punish such conduct, besides enforcing restitution of the moneys so unlawfully taken from the insolvent's assets. I discharge the summons with costs.

Summons discharged with costs.

WOOD v. FOSTER.

Taxation—Arbitrator's fees—Judge of County Court—Counsel fee at trial when cause referred.

Held, that when a reference is made from *Nisi Prius* to a Judge of a County Court by name, adding his description, Judge of a County Court, and not to him as Judge of the County Court, he is entitled to his fees as such arbitrator. Held, also, that a counsel fee may be taxed for the trial, although the case is referred to arbitration without being entered upon.

[June 18, 1874.—*Galt, J.*]

This was a summons calling upon the defendant to shew cause why the Master should not be ordered to review his taxation as respects certain items, being charges for a counsel fee of \$15 at the trial, when the cause was referred, and a sum of \$69 paid to the arbitrator.

Mr. Killam (Richards & Smith), shewed cause.

Mr. Small (Harrison, Osler & Moss), contra.

GALT, J.—Before considering the last item, which involves a question of considerable importance, I have to state that in all cases of this description reference should be made to the Master himself, before application is made to review a taxation. This was not done in the

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present case, otherwise an appeal would have been unnecessary.

The second item involves a question of considerable importance. It is this: Is a Judge of a County Court precluded from charging fees as an arbitrator in cases referred to him from *Nisi Prius*, where the reference is made to him by name, adding his description, Judge of the County Court, and not to him as Judge of the County Court; for example, in this case the reference is to R. F. S., Esq., Judge of the County Court.

By the 158th sec. C. L. P. A., the Court or Judge, on the application of either party, may refer the whole or any part of a claim to an arbitrator appointed by the parties; or, in cases in the Superior Courts, to an officer of the Court; or, in country causes in the Superior Court, to the Judge of any County Court. In cases of this description, I consider the taking such a reference as part of the official duty of the Judge of the County Court, and not entitling him to make any charge for his services. Sec. 160 is as follows: In all actions involving long accounts the Judge may, at and during the trial, direct a reference, &c., and, if the parties agree upon the arbitrators, the names of those agreed shall be inserted in the order of reference; but, if the parties cannot agree, the Judge shall name the arbitrator or arbitrators, and appoint all other terms and conditions of the reference, &c. And the Judge directing any reference under this section *may* direct such reference (if he sees fit to do so) in like manner as he has power to do under the two last preceding sections; that is to say, under the sec. 158 above mentioned, or sec. 159, which has no bearing on the present question. In cases arising under this section, the Judge has the power to appoint any arbitrator he pleases, and he *may*, if he sees fit so to do, refer it to a County Court Judge, but he need not necessarily do so; it is optional with him to make the reference in that form. If he then directs a reference to a gentleman by name, who fills the office of County Court Judge, and, in drawing up the order of reference, the designation of the arbitrator is filled in as matter of description, I am of opinion that the Judge must be considered as acting under the former and not the latter part of the section, and I can see no reason why the arbitrator so appointed should not receive his fees. The 161st sec. strengthens me in the view which I have taken; for, in references under that section, the Judge has no discretion given to him. The reference must be

to the officers therein named, among whom are Judges of the County Court, and I presume those officers would be considered as acting in their official character, and consequently not to be entitled to fees.

In my opinion, in references from *Nisi Prius*, the true construction of the 160th sec. is, that unless the Judge expresses a desire to make the reference under the 158th sec., he should be taken to have intended a reference under the authority given to him to refer to any person he pleases. In the former case the Judge would not be entitled to charge fees, but in the latter he would.

As to the counsel fee at the trial, I think it should be allowed, as the counsel must have gone to all the trouble of preparing his case; and, if a different rule were to be pursued, counsel could not be asked to consent to cases being referred without being gone into.

Revision ordered.

DEADMAN V. AGRICULTURE AND ARTS ASSOCIATION.

Division Courts—Prohibition—Appearance and defence in Court below.

Held, that a party not raising the question of jurisdiction on the trial of a case in the Division Court, is not prohibited from raising the question upon the second trial, a new trial having been granted.

[June 20, 1874.—*Galt, J.*]

This was an application for a prohibition to the Judge of the fourth Division Court of the County of Middlesex, to restrain him from further proceeding in this cause, on the ground that the said Division Court had no jurisdiction.

The circumstances, as appeared from the affidavits, were, that this plaint was brought to recover the value of a prize offered by the defendants, to which the plaintiff claims to be entitled; that the place where the exhibition was held, was at the city of London, which is within the jurisdiction of the first Division Court; and that the principal place of business of the defendants is at the city of Toronto; that a writ of summons was issued out of the fourth Division Court, to which the defendants duly entered a notice of defence, but did not give notice of any objection in regard to the jurisdiction of the Court; that the case was tried and a verdict given in favour of the plaintiff.

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It was asserted on behalf of the plaintiff, that any objection on the question of jurisdiction was expressly waived by defendants. On the part of the defendants, the gentleman who represented them stated that the question of jurisdiction was not raised or discussed. The learned judge granted a new trial for the purpose of enabling the defendants to produce further evidence. At the second trial, the objection was expressly taken that the Court had no jurisdiction to try the case ; that it should have been tried either at the city of London as being the place where the cause of action arose, or at the city of Toronto, as being the place of residence of the defendants. The learned Judge overruled the objection on the ground that it should have been taken at the first trial, and a verdict was again rendered for the plaintiff. The defendants then applied for this prohibition.

Osler shewed cause, citing *Knowles v. Holden*, 24 L. J. Ex. 223; *De Haber v. Queen of Portugal*, 20 L. J. Q. B. 488, 498; *Mayor of London v. Cox*, L. R. 2 H. L. 239; *Smith v. Rooney*, 12 U. C. Q. B. 661; *Help v. Lucas*, 8 U. C. L. J. 184; *McKenzie v. Keene*, 5 U. C. L. J. 225.

Murdock, contra, cited *Forbes v. Smith*, 10 Ex. 717; *Ellis v. Watt*, 7 D. & L. 299; *Zohrab v. Smith*, 5 D. & L. 639; *Roberts v. Humby*, 3 M. & W. 126; *Yates v. Palmer*, 6 D. & L. 283; *Thorn v. Camden*, 2 H. & N. 533; *Mayor of London v. Cox*, ante.

GALT, J.—The third section of the Division Court Act states the number of Courts in each county or union of counties ; each of these Courts is a separate Court, and has a separate seal. The fifty-fourth section enumerates the class of subjects over which these Division Courts shall have no jurisdiction. The fifty-fifth section then gives jurisdiction in all personal actions where the debt or damage claimed does not exceed \$40. The seventy-first section, on which the present question arises, is “Any suit may be entered and tried in the Court holden for the division in which the cause of action arose, or in which the defendant resides or carries on business at the time the action is brought, notwithstanding that the defendant or defendants may at such time reside in a county or division different from the one in which the cause of action arose.” This section is amended by 27 & 28 Vict. ch. 27, but the amendment does not affect this case. From the foregoing, it is plain that Division Courts are inferior Courts of limited local jurisdiction, and that jurisdiction

is confined to the place where the contract was made or where the defendant resides. The question then is, can the parties by appearing at the Court, out of which the summons issued, which is neither of these, confer jurisdiction. The law with respect to Courts of limited local jurisdiction is laid down by Lord Campbell, in the case of *DeHaber v. Queen of Portugal*, 20 L. J. Q. B. 493, in which he says, “No agreement of counsel to abstain from making the objection, can alter the law of the land which says, that an inferior Court can only hold plea where the cause of action arises within the local limits to which its jurisdiction by charter or custom is confined.”

The case of *Knowles v. Holden et al.*, 24 L. J. Ex. 223, is in some respects similar to the present, in this, that the parties had appeared before the Judge, and had agreed to a reference to arbitration without objecting to the want of jurisdiction ; but one of them, during the progress of the reference, objected to the jurisdiction of the arbitrators, on the ground that title to land came in question, and the arbitrators proceeded with the reference. Held, that he was entitled to a prohibition. Pollock, C. B., said, “The defendants, by attending the County Court and not taking the objection at that time, have not given that Court jurisdiction.”

The case of *Ellis v. Watt*, 7 D. & L. 299, was a case where the Court had jurisdiction, the objection taken being that the Court was proceeding irregularly. The rule was refused. In *Roberts v. Humby*, 3 M. & W. 126, the rule was made absolute for a prohibition, although sentence had been passed. In *Zohrab v. Smith*, 5 D. & L. 639, the Court had jurisdiction and the rule was discharged. In *Yates v. Palmer*, 6 D. & L. 283, Wightman, J., says, “Without pausing to enquire what would be the effect of a prohibition where nothing remains to be done to which it could apply, it is sufficient for the present purpose to observe, that it was agreed in that case (*Roberts v. Humby*, 3 M. & W. 126), as it had been in former cases that had been cited, that if a party makes no objection to the jurisdiction of the Court whilst the case is proceeding, apparently acquiesces in the jurisdiction, and suffers the Court to act without protest or objection, as if it had jurisdiction, down to actual payment of damages and costs, it is too late to apply for a prohibition even though he had no opportunity to apply to the superior Court earlier ; unless the defect appears upon the face of the proceedings.”

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In the case before me, an objection was taken to the Court proceeding on the ground of want of jurisdiction, and the objection was overruled. I think, therefore, that I am bound to look at the case as if it had come before me at the stage of the proceedings when the question was raised, and as I have no doubt that the Court had not jurisdiction, and that a prohibition would have been granted at that time, I think it should issue now.

Mr. Murdoch, in his ingenious argument, relied strongly on the case of *Forbes et al. v. Smith*, 10 Ex. 717, but that case differs widely from the present; there the Court had undoubtedly jurisdiction, if the defendant was brought before it, and the question was, whether the Court had power to enforce the appearance of the defendant. The defendant, having appeared, was held to be estopped from raising that point.

Prohibition ordered.

PRACTICE COURT.

MORDEN V. WIDDIFIELD.

Award—Umpire deciding without hearing evidence orally.

Held, that an award decided by an umpire who does not hear the witnesses himself, but takes their evidence from the notes taken by the arbitrators, and from their statements of the nature of it, will be set aside, unless there was an express consent to such a course by both parties.

[Easter Term, 1874.—*Morrison, J.*]

F. Osler obtained a rule last Michaelmas Term calling upon Morden to shew cause why the award made herein should not be set aside on the ground that the award was made by one of the arbitrators and the umpire, without the latter having heard all the evidence, and that after his appointment he should have reheard the evidence previously given to the two arbitrators, or the evidence should have been reheard before the two arbitrators and the umpire, and that the umpire was influenced in making the award by the statements of the other arbitrators. It was also moved upon the ground of a gross mistake having been made by the arbitrators who made the award, or why the award should not be sent back to the said arbitrators.

Kennedy, shewed cause.

Osler, supported his rule.

It appeared from the affidavits filed on the part of the applicant, Widdifield, in his own affidavit, that of the arbitrator Oldham and the umpire Robinson, as well as the examination of the umpire taken under oath before Mr. Dalton, under the statute, that—after the appointment of the umpire (Mr. Robinson) Widdifield demanded that all the witnesses should be again examined in presence of the third arbitrator, but that the arbitrator Kester refused to agree to this being done, considering it unnecessary as the evidence was written down, and that Wid-

difield protested against the making of the award unless the witnesses were heard by the umpire, and that much evidence was given which was not taken down. Robinson, the umpire, stated that although the applicant and the other arbitrator, Oldham, protested against an award being made without rehearing the witnesses, that he made the award, so far as he was concerned, from the notes of the evidence taken before his appointment, and that he derived his knowledge from the evidence so taken down, and from conversations with the two other arbitrators. Oldham, the dissenting arbitrator, stated that the applicant required and urged that the witnesses should be re-examined, as much of the evidence had not been taken down, and that the umpire would be compelled to rely on what he might be told; that Kester refused to consent and induced the umpire to agree with him, and that before the award was made he, Oldham, and the applicant, Widdifield, protested against the award being made as the witnesses had not been heard by the umpire; it appeared also that some of the witnesses were in attendance to be re-heard.

On the part of Morden and in support of the award, the affidavit of Kester the other arbitrator was filed, in which he stated that the three arbitrators conferred together as to the best course to pursue as to the re-hearing of the witnesses, and that it was by all parties acquiesced in (without stating specifically the parties), that it was unnecessary to again hear the whole evidence by the three arbitrators, and that no objection was taken to the close of the case, and he denied that there was any request to re-hear the witnesses or any protest against proceeding without doing so. Mr. Campbell, who acted as counsel for Morden, stated that he understood it was decided by the arbitrators, with the consent of the parties, that it was unnecessary to re-hear the evidence, and that no objection, to his recollection, was taken as to the course pur-

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sued by the arbitrators, and that none was taken to the close of the case.

Morden, in his affidavit, stated also that he understood it was unnecessary to rehear the witnesses, and that no objection was made, and he heard no demand for the re-examination, and no protest against making the award. The arbitrators awarded that Widdifield should pay \$223.93 to Morden.

MORRISON, J.—In this case a submission had been entered into by which the matters in difference were left to two arbitrators, Kester and Oldham, and in the event of their disagreeing, they were authorized to appoint a third or umpire, and that the award of any two of them should be final, &c. It appeared that the two arbitrators proceeded with the arbitration and examined witnesses, reducing their testimony to writing; that finding they would not agree they appointed one Robinson as the third arbitrator or umpire; that after his appointment some other witnesses were examined, and eventually an award was made, signed by one of the arbitrators, Kester, and the umpire Robinson, the other arbitrator refusing to join in the award.

I have read all the affidavits filed, and carefully noted their contents, and I have arrived at the conclusion that the evidence preponderates in favour of the contention of the applicant Widdifield, viz., that the award was made by one of the arbitrators and the umpire, the latter not having heard the witnesses examined prior to his appointment as umpire, and that he relied on the notes of evidence taken by the other two arbitrators, and from what he was told by the other arbitrators that the witnesses had testified to, and that this was done against the protest of Widdifield, the applicant, and the other arbitrator Oldham, who refused to join in the award. It is true that the affidavits are contradictory as to the facts, it being contended on the one side that the testimony and evidence given in examination of the witnesses previously given should be read over to the umpire, and on the other side, that it was required and protested that such evidence should be re-heard by the umpire and not taken from the notes of evidence of the arbitrators. The affidavit filed against this application are far from positive on this point, they rest upon the unsatisfactory statement of the deponents that it was understood that such an agreement was arrived at by the parties, but it is not specifically shewn who the parties were, whether it was the arbitrators only or the con-

testing parties. On the other hand there is the positive affirmative affidavits of one of the arbitrators, one of the parties, the applicant and another, a witness who was called and examined, that such was not the case.

The case of *Jenkins et ux. and others*, 1 Dowl. P. C. N. S. 276, is somewhat like this case. There, evidence was set up as in this case. Patterson, J., said in giving judgment, “The only objection which I have to consider is that with respect to the conduct of the umpire in not examining the witnesses although requested to do so * * * it was his duty to do so at the request of either of the parties. The only case where the notes of the arbitrators can be made the foundation of an umpire’s judgment, is where it is done by consent. Here no consent was given. If either party require him to examine the witnesses he (the umpire) is bound to do so * * and from the contents of the affidavits it does not appear to me that what passed amounted to a waiver”—in that case the award was set aside. In *Russel on Powers and Duty of an Arbitrator*, 230, it is laid down that the umpire must examine such witnesses as the parties choose to produce although the same witnesses have been examined to the same points before the arbitrators, he may not take the evidence or any part of it from the notes of the arbitrators unless there be a special provision in the submission, or a clear agreement between the parties permitting such a course: see *In re Salkeld and others* 4 P. & D. 732.

In the present case I find no consent given to the umpire reading the notes of evidence of the other arbitrators, nor do I think there was any waiver, the circumstances are quite inconsistent with a waiver. As I have said, the preponderance of testimony goes to shew that the umpire was required to examine the witnesses himself, and that a protest was entered against any award being made without the umpire so examining the witnesses. When the matter of waiver is set up, it must be clearly set out: *Watson on Awards*, 121.

I think on that ground alone the award must be set aside.

Award set aside.

LYGHT v. CANUTE.

Arrest for too much—Costs—C. L. P. Act, sec. 322.

Held, that unless a defendant has been both "arrested" and actually "held to special bail," he cannot take the benefit of sec. 322 of C. L. P. Act as to costs.

[Easter Term, 1874.—*Morrison, J.*]

It appeared from the affidavits filed in support of the motion, that the plaintiff had been arrested and held to bail for \$820, and was lodged in jail on the 5th September last, where he remained in custody over night, and was released by the sheriff on giving bail, and that on the trial of the suit the plaintiff recovered only \$458.26. It appeared also that this suit was commenced by a writ of summons on the 1st September, 1873, and that a writ of capias, on which the defendant was arrested, was issued on the 5th September.

From the affidavits filed in opposition it appeared that the action was commenced by a specially endorsed writ of summons, that the writ of capias was issued after the commencement of the action; that on the day after the defendant's arrest he gave a bond to the sheriff conditioned to cause special bail to be put in; that an application being made for the defendant's discharge, an order was made by the Judge of the County Court, dated 16th September, for the defendant's discharge from custody, and the bond given to the sheriff was ordered to be delivered to the defendant to be cancelled. Special bail was not at any time given.

Affidavits were filed on both sides as to the absence and evidence of probable cause for the arrest which it is not necessary to refer to.

Davidson obtained a rule *nisi* to prohibit the plaintiff from taxing costs in this cause, and to shew cause why the defendant's costs should not be set off or deducted from the plaintiff's verdict, the defendant having been arrested, without reasonable or probable cause, for a larger sum by \$361.74 than the plaintiff recovered at the trial of the cause.

Crerar shewed cause.

Robertson, Q. C., supported the rule.

MORRISON, J.—In this case the defendant was arrested, and was in custody for a night upon a capias issued in this cause by a Judge's order, after the commencement of the action. Before putting in special bail he was discharged from custody, and the bail bond to the sheriff ordered

to be given up to be cancelled, owing to some defect or irregularity.

I have looked at the case referred to by Mr. Robertson, *McGregor v. Scott*, Tay. R. 56. The report is very meagre, but it is, I think, only an authority that a party arrested and confined in jail is entitled to the benefit of the act.

I find the same laid down by Lord Abinger, in *Preedy v. Macfarlane*, 3 D. P. C. 458, that if a person is arrested and lies in jail he is within the meaning of the statute. In *Morse v. Teetzel*, 1 Prac. R. 369, special bail was put in, and the only question was, whether there was an arrest of the defendant, and that case goes to shew that besides putting in special bail an arrest was necessary. The following case, *Bates v. Pilling*, 2 D. P. C. 367, was referred to, where Bayley B., after referring to various decisions, held that to enable the defendant to bring himself within the act both incidents, arrest and holding to special bail, must be shewn, and the other two Barons were also of opinion that both must appear, the words of the statute, 43 Geo. III., ch. 46, sec. 3. being "arrested and held to special bail." The same words are used in sec. 322 of our C. L. P. Act. And in *Bennet v. Burton*, 9 Dowl. 492, the defendant having been arrested, and without putting in special bail was discharged on entering a common appearance, it was contended he had not been held to special bail, although arrested. The case of *Bates v. Pilling* is a clear authority on the construction of the Act, that the defendant must be both arrested and held to special bail, and, as it was not sworn that he was held to special bail, the rule was discharged. In *Reynolds v. Matthews*, 7 Dowl. 580, a case very like this, the defendant being arrested and having given a bail-bond to the sheriff, the capias was afterwards set aside and the bond to the sheriff delivered up to be cancelled. Littledale, J., in giving judgment, said—"The first question is, whether there was an arrest; and the second, a holding to special bail. If either of these was wanting the application under the statute must fail, for it has been held that there must be an arrest and also a holding to special bail to entitle the defendant to this rule * * There is no case deciding that the mere taking of a bail-bond is a holding to special bail within the Act, though from the intimation in some of the cases it would seem rather that it was. But then the question is, whether, as the defendant himself has had the bail-bond cancelled on the summons, he has not waived taking the benefit of the statute by proceeding on that summons." The learned Judge did not decide the latter point.

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LYGHT v. CANUTE.

[Prac. Ct.

If the point before me was one of first impression I think I should have held that an actual arrest and a giving of a bail-bond to the sheriff which amounts to an undertaking to put in special bail would be sufficient to satisfy the statute as to the case itself. I see much force in what was said by Littledale, J., in *Reynolds v. Mathews*, for holding that this defendant—by obtaining his discharge from the arrest before putting in special bail and an order for the bail-bond to the

sheriff to be cancelled—deprived himself of the benefit of the statute.

On the whole I do not think myself warranted, in the face of the decisions I have referred to, in making this rule absolute.

Rule discharged.

Chy.—M. O.]

ALDWELL V. ALDWELL.—IRWIN V. BUCK.

[Chy.—M. O.]

CHANCERY — MASTER'S OFFICE.

ALDWELL V. ALDWELL.

Vendor and purchaser—Waiver of acceptance of title.

Acceptance of title by the act of the purchaser in going into possession, was held to be waived by the vendor's solicitors delivering the abstract of title, and answering some of the requisitions.

[October 24, 1874.—*Taylor, Master.*]

Reference as to title under the Consolidated General Orders at the instance of the purchaser.

That the following proceedings had been taken at the respective dates was admitted on both sides: report on sale, 20th June, 1874; demand of abstract served, 18th June; possession taken, 4th July; abstract delivered, 19th August; requisition served, 4th September; partial answers to requisitions served, 18th September.

R. E. Kingsford, for the vendor, contended that he was not bound to shew title now, the purchaser having accepted the title by taking possession. He cited *Patterson v. Robb*, 6 Pract. R. 114.

G. M. Rae, for purchaser.

Master TAYLOR.—I overrule the objection. The vendor's solicitor, after the doing of the act now relied on as an acceptance of the title, having gone on to deliver an abstract and shew title, he cannot now set up the waiver of a reference or right to a reference by the purchaser. *Burroughs v. Oakley*, 3 Sw. 159, and *Harwood v. Bland*, Fla. & K. 540, may be referred to on this point.

The inclination of the Court, it was said by the Chancellor, in *Mitcheltree v. Irwin*, 13 Gr. 543, always is to sustain the right of the purchaser to have a good title made out. If the vendor's solicitor had intended to rely on the acceptance of title by the act of the purchaser he should have done so at first and not have de-

livered an abstract. By delivering the abstract and answering some of the requisitions he has admitted that the question of title is one still open between the vendor and the purchaser.

The consideration of the abstract should therefore be proceeded with.

IRWIN V. BICK.

Costs—Administration.

A motion for an administration order was refused with costs, on the ground that no personal representative of deceased was a party. Affidavits had been filed in answer to the motion on the merits.

Held, that the costs of only so much of these affidavits should be allowed, as would be equivalent to a demurrer.

[November 21, 1874.—*Taylor, Master.*]

A motion for an administration order under Consolidated General Order 467 was refused on the ground that no personal representative of the deceased was a party defendant. Affidavits had been filed to answer the motion on the merits. The question now raised was whether the costs of such affidavits could be taxed to the defendant.

J. S. Ewart, for defendant.

W. G. P. Cassels, for plaintiff.

Master TAYLOR.—The motion having been refused on a ground which would have been properly taken by demurrer had a bill been filed, only so much of the affidavits should be allowed as would be equivalent to a demurrer for raising the question.

Chy. Cham.]

LEMON v. LEMON.

[Chy. Cham.

CHANCERY CHAMBERS.

LEMON v. LEMON.

Con. Stat. U. C. cap. 24, sec. 41—Examination of judgment debtor—Application to commit.

When a debtor has been examined under Con. Stat. U. C. c. 24, sec. 41, an order for his attachment will be granted,—1. If he has given unsatisfactory answers; 2. If it appears that he has made away with his property in order to defeat or defraud his creditors.

Held., 1. That proceedings under this Act being of a penal nature, a clear offence under the Act must be shewn to warrant an order for attachment.
2. That the debtor must have contumaciously refused to answer, or so equivocated as to render his answer no answer at all, before he can be said to have given "unsatisfactory" answers.

[March 4, 1874.—*Referee.*
April 13, 1874.—*Strong, V. C.]*

This was a suit for alimony. On the 4th December, 1873, the plaintiff obtained an order for the payment of \$119, being interim alimony up to the 5th January, 1874; and for \$17 per month thereafter. On the 3rd February, 1874, an order was made for the examination of the defendant under C. S. U. C. cap. 24, sec. 41.

This order allowed the plaintiff to examine the defendant "as to the property and means he had when the order of the 4th December, 1873, was made, and the liability for the amount therein mentioned was incurred; and as to the property and means he still has of paying the amounts directed to be paid by that order; and as to the disposal he may have made of any property since the date of the said order," (*i. e.* 4th December, 1873.)

Under this order the defendant was examined. The plaintiff now applied to commit him, because, upon the examination, "the defendant refused to disclose his property or his transactions respecting the same, and did not make satisfactory answers respecting the same, and because the defendant has concealed or made away with his property in order to defeat the plaintiff, a

creditor of the defendant," or else it was asked "that the defendant be ordered forthwith to pay the amount due the plaintiff, or stand committed."

A. Hoskin, for the plaintiff.

Arnoldi, for the defendant. To warrant an order, there should be some strong evidence of a crime under the Act: *Hobbs v. Scott*, 23 U. C. Q. B. 621. There should also be some record in writing of the questions and answers on the examination, or a certificate of the facts in regard to them by the examiner: *McInnes v. Hardy*, 7 U. C. L. J. 295; *Ward v. Armstrong*, 4 Prac. R. 58.

MR. HOLMESTED.—Where the application to commit is made to a tribunal different from that before which the examination takes place, it is generally speaking a difficult matter to decide whether the defendant has made satisfactory answers. This difficulty has been felt by the Court in more than one instance; and in *Hobbs v. Scott*, 23 U. C. Q. B. 621, it is the subject of remark. In that case, Draper, C. J., observes: "It is extremely difficult to arrive at any satisfactory conclusion in cases like the present, where there is nothing before the Court but a written continuous statement of answers made by the defendant upon his examination. Of the questions put to him, there is no information except by inference; of the necessity for repeating the same questions in a varied shape to avoid evasion; of delay and hesitation in giving answers, we know nothing; nor of the character of the questions, or of the manner of putting them, which may be irritating and painful to the defendant under examination. The manner of giving answers may be such as to lead to a conviction of dishonesty and suppression of truth, even though in words the answers might be such as a man, broken down by unforeseen failure and the prospect of privation for a wife and children, would give in a spirit of hopeless

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despondency. Even a refusal to answer a particular question, without a clear view of its value and connection with surrounding circumstances, might appear to justify a most unfavourable conclusion against the prisoner, and yet might not really warrant it."

The difficulty felt by the Court in that case is none the less apparent in the present case. But after carefully considering the examination of the defendant, I am unable to come to the conclusion that it is proper to grant this application.

I think, in the first place, I am bound to consider the nature of the examination which, by terms of the order, the plaintiff was at liberty to make; and I am then to see whether, in respect of any of the matters falling within the proper scope of that examination, the defendant has made or refused to make answers so as to subject himself to the penalty which the Act imposes.

The interim alimony is computed by the terms of the order up to the 5th January, 1874, being a period of seven months; so that for a period of six months prior to the date of the order for interim alimony, there had been a continuous liability on the part of the defendant, the amount of which was ascertained by the order of the 4th December, 1873. From the wording of the order for examination, however, I am not clear that the plaintiff was strictly entitled to carry back her enquiries as to what property and means the defendant had prior to the 4th December, 1873. The order would seem to assume that the making of the order for the payment of interim alimony, and the incurring of the liability therefor, were contemporaneous; and moreover, the order clearly only authorizes an enquiry as to what disposal the defendant may have made of his property since the date of the order. On the whole, I think the plaintiff was not entitled to interrogate the defendant as to any property he had prior to the 4th December, 1873, except only so far as it was necessary to do so, in order to learn what property he had on that day.

I think it can hardly be doubted that prior to the 4th June, 1873, at all events, it was quite open to the defendant to make any disposition of his property which he pleased, without in any way subjecting himself to any of the penalties of the Act, so far as this plaintiff is concerned; and bearing that fact in mind, I have come to the conclusion that nothing appears upon the

examination of this defendant which would warrant my ordering his committal. The examination has been carried back to the fall of 1871, when the defendant sold off his farm and stock. And the plaintiff has interrogated the defendant as to what he has been earning and what he has expended since that time; and the result of the account, as the plaintiff makes it out from the defendant's statement, is that the defendant ought to have \$500 more than he admits that he has.

When or how the deficit occurred, there is nothing whatever to show. The \$500 may have been wasted or dissipated long before June, 1873, for anything that appears to the contrary; and if it were, the plaintiff would have no ground of complaint. The mere fact that a man cannot, from memory, give a full and exact account of all the items of his expenditure for a period extending over more than two years, does not seem to me to be very extraordinary, especially when, as in this case, he has not kept any record of his transactions; and I think I should be placing a very harsh construction on the statute if I were to hold that the failure to give such particular account was punishable under the Act, where no *mala fides* on the part of the examinant otherwise appeared.

The plaintiff contended that the defendant having released his brother from a mortgage which he owed him, was a wrongful disposition of property within the meaning of the Act. From the examination, however, it appears that this release took place long before the order of the 4th December, 1873, was made, and therefore I do not think as against the plaintiff it can be said that the release was an improper act.

The defendant admitted that he had \$80 on hand, but no question was apparently put to him as to his willingness to apply it in payment of the amount due the plaintiff, or as to his reasons for refusing to do so in case he should refuse; so that it is difficult to come to any conclusion as to the defendant's conduct in respect of that sum.

The plaintiff's solicitor has argued that even if the plaintiff could not properly carry back her enquiry into the defendant's property prior to the date of the order of the 4th December, 1873, there is still sufficient appearing on the examination to warrant defendant's committal, because it is said defendant admitted that he had \$300 or \$400 in his possession within the three months preceding his examination, of

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which he failed to give an account. The examination took place on 24th February, 1874. Three months preceding that date would be 24th November, 1873, *i. e.* ten days before 4th December, 1873, when the order for payment of interim alimony was made.

The plaintiff, as I have already observed, had no right to make any enquiry as to any disposition which the defendant had made of his property prior to the 4th December, 1873. Bearing this in mind, I find the defendant says:—"I don't remember how much money I had three months ago. I might have had \$300 or \$400 inside of that time altogether. I have given no money to my sisters or any of my other relatives. * * I have no other money now but the \$80. I have no securities of any kind; no one owes me any money. * * I have not invested any money, nor have I put any money in any business." In a previous part of his depositions, he says: "I have spent, perhaps, as much as \$100 within the last three months, perhaps a little more. I believe I have spent \$150 within the last three months. I don't believe I have spent more than \$200 within the last three months. I have not paid anything for board within the last three months, except for an odd meal or two, I owe for three weeks board. I have paid for clothing, within the last three months, not more than \$20. I can't say how much I have spent." He then enumerates payments he has made for clothing, amounting in all to about \$10.60, and continues: "I have given nothing to my wife and children within the last three months. I don't think I have paid anything for doctors' bills the last three months. I have not spent much money in travelling during the last three months, not over \$15. I guess that will cover it. I don't know that I have lost any money during the last three months. I don't know what I have spent money upon; I have not spent much in drinking. I am more likely to have given money away. I don't know that I have given any money away. I don't remember doing so. I may have paid some small debts within the last three months. I don't remember that I have done so."

The defendant does not appear to have been asked how much money or property he had on the 4th December, 1873, or on any day subsequent thereto; neither does he appear to have been asked to state what payments or other disposition of his property he has made since that date. On the contrary, the examination has been so directed as to include within the

enquiry a period of time, concerning which the plaintiff had no right to make enquiry.

In *Hobbs v. Scott*, to which I have referred, Draper, C. J., remarked: "In one sense, answers are unsatisfactory which do not account for the application of the debtor's assets in a proper manner; but I do not interpret the word in that sense. I am not prepared to say that a refusal to produce and deliver property to the sheriff, that it might be taken in execution for the benefit of one creditor, when it is afterwards applied to the satisfaction of another, is a refusal to disclose his property within the meaning of the Act. Nor is a case of fraudulent concealment so proved, by what appears on the examination before us, as to relieve me from the apprehension that if I should agree in ordering the defendant to be committed I should be doing injustice. I am required to find the facts which subject the defendant to punishment. *I think if there be a ground for reasonable doubt, the defendant is entitled to the benefit of it.*" Hagarty, J., also said: "As suggested by the learned Chief Justice, this case is, as it were, a trial of defendant, and conviction as for an offence;" and see *Ward v. Armstrong*, 4 Prac. R. 58. If the defendant had been bound to disclose his transactions with relation to his property for the full period of the three months, respecting which he was interrogated, there might have been some ground for saying the answers he made were unsatisfactory; but inasmuch as he was not bound to do so, I think it is impossible for me to arrive at that conclusion. The plaintiff, by the course of the examination, has rendered it doubtful how much the defendant's answers apply to the period anterior to the 4th December, 1873, and how much of them to the time which has elapsed since then. And the defendant is entitled to the benefit of the doubt thus created. I am unable, therefore, to see any ground for the present application, which must be refused.

This order was appealed from.

April 13.—STRONG, V. C.—The order of the Referee must be affirmed. The report of *Hobbs v. Scott* shews that the Court thought in that case, that as the proceedings under this Act are clearly of a penal character, and imprisonment is awarded on the principle of punishment, it is only to be inflicted upon a clear offence being shewn. There are two cases given in the Act, in which a debtor, who has been examined, may be committed,—(1) Where he has given unsatis-

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factory answers; (2) where it appears that he has made away with his property in order to defeat or defraud his creditors. That the answers of the person examined may be considered "unsatisfactory," I think that he must either have contumaciously refused to answer, or so equivocated as to render his answers, in reality, no answers at all. The defendant in this case has not been examined in my presence; and I cannot, from the material before me on this motion, say that the answers given by him are unsatisfactory. As to the disposition of the defendant's property, it is some time ago since this was made, and, as an explanation of that transaction has been made by the debtor upon oath, from which it would appear that it was not a fraudulent disposition, that explanation must, for the purposes of this application, be conclusive. This appeal is therefore dismissed, but without prejudice to another examination of the defendant being had; but it would be more satisfactory that such examination should, if had, be before a Judge.

Appeal dismissed.

WAGNER v. MASON.

Discovery and production—Motion to commit.

Where an order limits a time to do an act, the order must be served before the time limited has expired, otherwise the party required to do the act will not be committed for disobedience.

Under an arrangement made by one P. with his creditors, by way of composition, the defendant Mason held the estate of P. in trust to secure the reimbursement or indemnity of the plaintiffs and one Harvey who became sureties for the payment of the composition. Some time afterwards, P. became again insolvent, and defendant, Mason, was appointed his assignee. A bill being filed to enforce the arrangement for indemnity charging that Mason, in breach of the arrangement, had suffered the estate to remain in the hands of P., documents held by Mason as assignee were held liable to production.

[September 15, 1874.—Referee.]

On the 4th of March, 1874, an order for production was obtained by the plaintiff and duly served on the defendant's solicitor. The defendants filed affidavits in answer which were considered insufficient, and an application was made by the plaintiff in May, 1874, to compel them to file better affidavits. On the 15th of May an order was made requiring the defendants to file a better affidavit within ten days from the

date of the order. Two motions were now made before the Referee, the one to compel the defendant Mason to efficiently comply with the order to produce issued by the plaintiff, and with the order of the 15th of May by producing and leaving with the Deputy Registrar the documents set forth in his affidavits on production. The other motion was to commit the defendant Harvey for non-compliance with the order of the 15th of May. The other material facts appear in the judgment.

Mr. Creelman (Crooks, Kingsmill, & Cattanach), for plaintiff.

J. Bain, for defendants.

MR. HOLMESTED.—The order of the 15th of May has not been served either upon the defendants personally, nor yet upon their solicitor; the plaintiff therefore is not in a position to commit either of the defendants for disobedience of that order. Neither could an application to commit be now maintained for disobedience of the original order. The defendants having filed affidavits in answer, although insufficient, the plaintiff's course is to apply to compel them to file a better affidavit; and it is only when it is shewn that the order for a better affidavit has been disobeyed that an order to commit for contempt could be granted. Where an order limits a time to do an act the order should be served before the limited time has expired, otherwise the party required to do the act will not be committed for disobedience, and I do not find any authority for saying that service of the order can be dispensed with merely because the solicitor of the party whom it directs to do a given act was present at the time it was made. In *Rider v. Kidder*, 12 Ves. 202, the party himself was actually present in Court when the decree was pronounced, but afterwards kept out of the way. Substituted service on his solicitor was ordered. So also in *De Mannerille v. De Mannerille*, ib. 203, where the party had declared he would not obey the order, service on his solicitor was allowed. But in this case there is no service either on the defendant or his solicitor. The application against Harvey, therefore, must be refused with costs.

The motion, however, against Mason is different: it not only seeks to compel him to comply with the order of the 15th of May, but it is also to compel him effectually to comply with the original order to produce by producing the documents mentioned in his affidavits.

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Now, as far as the order of the 15th of May is concerned, nothing can be asked by the plaintiff; that order merely directs that the defendants do file a further and better affidavit. The defendant Mason has complied with that order so far as filing a further affidavit, so that the omission to serve him with the order of the 15th of May is immaterial. What the plaintiff complains of is, that he has not lodged with the Deputy Registrar the documents which he admits he has in his possession, and that is a disobedience of the original order for production.

In the first affidavit filed the defendant Mason admitted that he had in his possession certain documents enumerated in the first part of the schedule to his affidavit. The production of these documents is in no way excused, and yet they have not been deposited with the Deputy Registrar. The plaintiff is entitled to an order to compel the defendant to deposit these documents.

In his second affidavit he has enumerated a number of other documents, and these he refuses to produce on the ground that they are in his possession as the assignee of the estate and effects of Robert Patrick, an insolvent under the Insolvent Act of 1869. In his first affidavit he had simply referred to them as "the usual papers and documents in an insolvency proceeding," and stated that they could be inspected at his office at any time. The second affidavit contains no such offer of inspection. The plaintiff's case seems to be shortly this:—He alleges that one Patrick became insolvent and the defendant Mason was appointed his assignee: that the insolvent subsequently effected a composition with his creditors, and in order to raise the money to pay the composition the plaintiff and the defendant Harvey became sureties on the understanding that Mason should stand possessed of the insolvent's estate in trust to secure their reimbursement or indemnity. The plaintiff alleges that Mason suffered the estate to remain in Patrick's hands in breach of the arrangement: that he has become again insolvent: that under the second insolvency Mason has been again appointed assignee and claims the estate as such assignee. The bill is to enforce the arrangement for indemnity. Mason, therefore, in the suit occupies two positions: he is made a party, *as trustee*, under the arrangement for indemnity, and he is also a party, as the assignee claiming adversely to that arrangement. The papers held by him as assignee therefore cannot be said to be held by him in a different

character from that in which he is a party to the suit, and production cannot be excused on that ground: *Pindar v. Smith*, 6 Madd. 48.

I am of opinion, therefore, that the documents are liable to production: but the defendant undertaking to submit them to the plaintiff's inspection at his (defendant's) office, I do not think they should be ordered to be deposited in Court, other parties, viz. the creditors, being interested in them.

The result of the two applications is, that the motion against Harvey is dismissed with costs: and, as against Mason, the order goes for production of the documents mentioned in the first part of the first schedule of his first affidavit; and he must undertake to submit the documents in the second part of the first schedule of his second affidavit to plaintiff's inspection, on receipt of twenty-four hours' notice of the time when plaintiff will attend to inspect the same.

The costs of this motion must be costs in the cause.

RE FREEBORN, FREEBORN v. CARROLL.

Administration order—All executors who proved the will not served.

On an application for an administration order, it appeared that two executors had proved the will, but one only had been served with notice of the application, the other being out of the jurisdiction. An order was refused until the absent executor should be served.

[September 21, 1874.—*Blake, V. C.I*

Motion for administration order.

Two of the executors had proved the will; only one of them was within the jurisdiction of the Court, and had been served. This executor was charged with having wasted the estate, and it was said that he was about to sell his property and proceed to North Carolina, in the United States, where his co-executor, who had not been served, now was.

C. Moss, for the executor who had been served. An order cannot be made in the absence of the other executor.

J. A. Boyd, for the applicant. The cases shew that where two defendants are jointly liable, and one is out of reach of process of the Court, the

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RE FREEBORN—FREEBORN v. CARROLL.

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other may be proceeded against alone : Story, 72; *Darwent v. Walton*, 2 Atk. 510; *Cowslad v. Cely*; Finch Eq. Prec. 83.

[BLAKE, V. C.—Since it has been allowed by our Orders to serve parties out of the jurisdiction, does not the reason for this rule cease ?]

No ; for it is not clear that the orders which allow service upon defendants out of the jurisdiction (Orders 90, 100-102,) make any alteration in the old rule, for these orders apply only to bills of complaint, not to petitions or notices of motion : and, at common law, although such service is there also allowed, the Courts still retain the old rule, as is seen by sec. 70 of the Common Law Procedure Act. That section prevents a joint obligor pleading in abatement the non-joinder of any other joint obligor, if such other joint obligor is not resident within the jurisdiction ; and a person suing an executor in this Court is not to be placed in any worse plight than if he sued at law. When once the case is in the hands of the Court, Orders 469, 470 shew the flexible nature of the proceedings, and give the Court control over them in every respect necessary to meet the ends of justice. The Court may give directions as to the service of the absentees : *Pitt v. Brewster*, 1 Dick. 37 ; cited in Williams on Executors (ed. 1873), p. 20, sec. 13, note (n) ; *Whittington v. Gooding*, 10 Ha. App. xxix, and 38 Geo. III. cap. 87. The plaintiff is entitled to an order against one executor directing that the other be added in the Master's office.

BLAKE, V. C.—I do not think there is any practice which would warrant my allowing an order now to issue, and the absent executor to be added in the Master's office.

If both the executors were within the jurisdiction, the presence of both would be indispensable, for either of them might be able to adduce something which would be an answer to the whole application. 38 Geo. III. cap. 87, does not assist this case, even if it is in force. It was simply intended to help the Court to issue process by which some person might, *durante absentia*, administer instead of the executor ; but under it the executor could not be called to account.

The old decisions are not now applicable. They all depend upon the fact that until an appearance was entered by the defendant, he

was technically not liable to the process of the Court. If he was out of the jurisdiction, and did not appear, as process did not run out of the jurisdiction, no order could be made against him ; and the plaintiff being unable to enter an appearance for him could not proceed nor obtain any relief. The Court therefore allowed the plaintiff to proceed against the person jointly liable within the jurisdiction, reserving to him the power to pursue his remedy against the person abroad, in the event of his coming within the jurisdiction. *Darwent v. Walters*, 2 Atk. 510, shews that this is the case. The language there used is, the defendant not "being amenable to the Court," and again, "not having appeared."

By our orders, and the Act in England, all this has now been changed, as was held in *Munro v. Munro*, 17 Gr. 205. The Court allows defendants out of the jurisdiction to be served, and they are thus made amenable to the process of the Court ; the old cases, therefore, are no longer applicable ; *cessante ratione legis, cessat ipsa lex*.

If it were only a question of account, the absent executor might be added as a party in the Master's office, but supposing that he held a release, it would be very inconvenient to send the case into the Master's office, and there, upon adding the absentee, find that he is entitled to discharge all the proceedings. There cannot be complete administration against one executor. The case of the plaintiff might be met in *limine* by the other (for all we know) ; and I think it would be subversive of the practice of the Court to allow a decree to issue, in the first instance, against a party who might shew that the plaintiff was not entitled to the administration at all ; and to allow him to be added in the Master's office as on a question of account, when he would be put to make a special application to shew the plaintiff is not entitled to this account.

The fact that the executor within the jurisdiction is making away with the estate is no reason for subverting the practice of the Court, as the plaintiff has his appropriate remedy by injunction.

I never heard of the difficulty that the Orders allowing service out of the jurisdiction apply only to bills, and I do not think it can be sustained. The only complaint has been that where the notice has been served on a defendant out of the jurisdiction, the time for shewing cause to the motion should be the same as for

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answering a bill. The application must stand over; the absent executor to be served not later than 17th October next, and to shew cause on 16th November. The plaintiff must pay \$2 costs of the argument to-day.

Motion refused.

ARNBERY v. THORNTON.

Vacating lis pendens—Class suit.

In a class suit, in which a decree has been made, although the plaintiff's claim has been paid, the bill will not be dismissed nor a *lis pendens* vacated, where other persons may be entitled to the benefit of the decree, and to retain the *lis pendens*.

[October 8, 1874.—*Referee.*]

This was a suit brought by the plaintiff, a creditor, to set aside a fraudulent deed made by one of the defendants, and a decree had been obtained in the plaintiff's favour in the usual terms, directing the Master to enquire whether there were any other creditors, and, if any, to take an account of the amount due to them, and in default of payment of such claims, ordering a sale of the land in question, and application of the purchase money in payment of the plaintiff and other creditors (if any). The decree had not been carried into the Master's office, and no proceedings had been had under it; the defendant, had, however, satisfied the plaintiff's claim for debt and costs, and the present application was made for an order vacating the certificate of *lis pendens*.

W. R. Mulock for the plaintiff.

MR. HOLMESTED.—This suit being a class suit, it is, I think, plain, after decree, that it cannot be dismissed, as the decree which has been made enures to the benefit of other creditors (if any) of the defendant. Neither, on the same principle, can any order be made vacating the *lis pendens* to the prejudice of other creditors (if any).

The only order that I think it would be proper for me to make, under the circumstances, is, that all proceedings in the suit, on the part of the plaintiff, be stayed, but without prejudice to the rights of other creditors (if any) to apply to prosecute the same, if so advised. See *Dan. Pr.*, 5 ed., p. 695, and see *Graham v. Chalmers*, 2 Chy. Ch. 53.

Re MCKIM.

Quieting Titles Act—Married woman—Next friend.

A married woman filing a claim under the Act for Quieting Titles will not be required to name a next friend, as sec. 41 of the Act provides that, for the purposes of the Act, a married woman shall be deemed a *feme sole*.

[Oct. 8, 1874.—*Mr. Holmested, Inspector of Titles.*]

The petitioner in this matter claimed title under the will of Jeremiah Earl. He alleged that after the will was proved in the Surrogate office it was surreptitiously mutilated by the obliteration of a line. According to the will, as it read after the mutilation, the specific devise under which the petitioner claimed was struck out, and the land appeared to pass under the residuary devise, under which residuary devise one Eunice Empey now claimed to be entitled. The local Referee had required notice to be given under the Act to Eunice Empey. She appeared to be a married woman, but she, nevertheless, filed a claim in her own name, and without a next friend, whereupon the petitioner applied to the local Referee for an order for her to appoint a next friend. She did accordingly appoint a next friend, who turned out to be insolvent; the petitioner then obtained from the local Referee an order to compel her to name a new and solvent next friend within a limited time, and in default barring her claim. She failed to comply with this order, and her claim had been barred, and no appeal appeared to have been made by her from the order.

MR. HOLMESTED, INSPECTOR OF TITLES.—Sec. 41 of the Quieting Titles Act provides that a married woman shall, for the purpose of that Act, be deemed a *feme sole*—the order barring Mrs. Empey's claim is therefore clearly erroneous; and where an order appears to be obviously erroneous the Court may, of its own motion, refuse to carry it into effect: see *Commercial Bank v. Graham*, 4 Gr. 419. Upon that principle I think I must hold that the petitioner is not in a position to obtain a certificate of his title until the claim of Mrs. Empey has been duly disposed of, notwithstanding that she has not appealed against the order under which her claim is barred.

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THE WESTERN OF CANADA OIL CO. V. WALKER.

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THE WESTERN OF CANADA OIL CO. V. WALKER.

Discovery and production of documents.

The plaintiffs' case, for the purpose of discovery, consists of every thing necessary to obtain a decree, including what may be required to answer the defence set up.

An affidavit on production, made by defendant, in which he objected to produce certain books of account, was held insufficient to protect them from discovery, because it did not state that the books did not contain evidence substantiating the plaintiffs' case, or that they only related to the defendant's case.

[October 12, 1874.—*Proudfoot, V. C.*, on appeal from Referee.]

This suit was brought against three persons, Walker, Smallman, and Reeves, and the bill alleged that Walker and Smallman, being respectively manager and secretary of the plaintiffs' Co., formed a partnership with their co-defendant Reeves, under the style of Geo. Reeves & Co., and that the defendants Walker and Smallman in violation of their duty had through this firm large dealings with the plaintiffs both in buying goods from and selling goods to and for the plaintiffs, and that out of such transactions the defendants reaped a large profit, and the plaintiffs claimed to be entitled to the profits so made, and filed this bill for the purpose of obtaining an account and decree for payment of them. The defendants by their answers admitted the relationship of Walker and Smallman as manager and secretary, and that these defendants were also members of the firm of Reeves & Co., and that that firm had large dealings with the company. They however denied that they had made a profit in some of the transactions, but the ground on which they resisted the plaintiffs' right to an account was their alleged acquiescence in the dealings between the plaintiffs' company and the defendant's firm. An order to produce documents was served by the plaintiffs, and in answer to that order the defendants filed affidavits admitting that they had in their possession "the books of account and accounts of the firm of Geo. Reeves & Co.," but they objected to produce the same on the ground "that as far as regards this suit they only contained an account of the profits, if any, made by the defendants upon sales to and for the plaintiffs, and that the plaintiffs were not entitled to an account of such profits without the decree of this Court declaring them to be so entitled."

W. G. P. Cassels for plaintiffs.

C. Moss for defendants.

MR. HOLMESTED.—The question for my consideration is, whether or not the reason given by the defendants in their affidavits sufficiently protects the documents in question from production. The plaintiffs insist that it is necessary for them in order to establish their equity to an account to shew as a matter of fact that profits were made, and in order to enable them to give this evidence they claim to be entitled to inspect the defendants' books.

The plaintiffs' equity I take it rests on the principle that no man can serve two masters, and that so long as the defendants Walker and Smallman held the position of servants of the company they were *ipso facto* debarred from dealing with the company either by buying from or selling goods to the company on their own private account, and that their breach of their duty, in this respect is the ground of the plaintiffs' equity to call them to account for their dealings, and that equity I think cannot on principle be in any degree dependent on the plaintiff being able to shew that a profit has been actually made by the defendants. See Story on Agency, ss. 210 *et seq.* Where a trustee has himself assumed to buy the property of his *cestui que trust* it has been repeatedly held that the latter might disaffirm the sale without shewing that the trustee has derived any advantage from his purchase, and I think the same principle must govern the plaintiffs' right to call for an account here. See *Campbell v. Walker*, 5 Ves. 680; *Ex p. Lacey*, 6 Ves. 625; *Ex p. James*, 8 Ves. 348; *Ex p. Bennett*, 10 Ves. 385; *City of Toronto v. Bowes*, 4 Gr. 489, and 6 Gr. 1. The plaintiffs' solicitor admitted that unless he could establish that the discovery of the documents in question is necessary to the plaintiffs in order to enable them to obtain a decree that they were not entitled to it, and I think he has failed to establish that point. It appears to me that this case is within the principle of *Adams v. Fisher*, 3 My. & Cr. 526, and that class of cases, and that production ought not to be ordered, on the ground that the discovery sought is immaterial to the question to be tried at the hearing, and that it would be premature to compel these defendants to disclose their books of account until it is seen whether the plaintiffs have the equity they claim to have, to call for an account. The application therefore must be refused, and I think the costs should be costs in the cause to the defendants.

From this judgment the plaintiffs appealed.

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PROUDFOOT, V. C.—I do not think it necessary to pronounce on the question which was argued a good deal on this appeal, and which seems to have been the only ground of the Referee's decision, viz., whether it is incumbent on the plaintiffs to shew that the defendants have made profits from their dealings with the company to entitle them to a decree, for I am of opinion that the affidavit on production does not shew a sufficient ground for protection. The defendants say "that as far as regards this suit the books only contain an account of the profits, if any, made by the defendants upon sales to and for the plaintiffs, and that the plaintiffs are not entitled to an account of such profits without the decree of this honourable Court declaring them to be so entitled." The books would shew I presume that there were sales of goods by the defendants to the plaintiffs, and sales by the defendants for the plaintiffs, and charges for commission, if any were made. And it is an essential part of the plaintiffs' case to shew that such sales were actually made. Because the plaintiffs may have other evidence of this fact, is no reason why they should be deprived of the evidence on these matters to be obtained from the defendants' books. And in particular as to the goods sold on commission it may be essential to the plaintiff's case to shew that a commission was charged. The admissions in the answers are so qualified that the plaintiffs cannot safely make use of them as evidence.

The plaintiffs' case, for the purpose of discovery, consists of everything necessary to obtain a decree, including what may be required to answer the defence set up. The defendants do not say that the books do not contain evidence substantiating the plaintiffs' case, or that they only relate to the defendants' case : Wigram on Disc. s. 100 *et seq.* And as they have not said so I cannot say so either.

I think the books must be produced.

Appeal allowed (a).

RE AXFORD.

Sale of infants' estate.

On an application, under Con. Stat. U. C., cap. 12, sec. 50, for the sale of infants' estate, the *examination* of the infants by the Master, under Con. Order 532, as to their consent, must be annexed to the petition. A certificate of the Master, stating that the infants have been examined by him, and that they consent, is insufficient.

[October 16, 1874.—*Referee.*]

This was an application for the sale of infants' estate. The Master at Chatham had attached to the petition a certificate certifying that the infants were produced before him, and that they were examined apart by him upon the matter of the petition thereto annexed, under Order No. 532 of the Consolidated General Orders, and that the said infants did consent to the sale of the land, as set forth in the said petition, and to the appointment of J. W. as guardian.

C. Moss for the application.

MR. HOLMESTED.—Order 532 provides, "Where the infant is above the age of seven years he is to be examined apart by the Judge or Master upon the matter of the petition, and as to his consent thereto, as required by the statute, and his *examination* is to be stated to have been taken under this order, and is to be *annexed* to, and filed with the petition." It is clear, from the wording of the order, that it is the *examination* of the infant which is to be annexed to the petition, and not merely a certificate of the Master of having examined him. The certificate in this case is therefore insufficient. The object of the order is apparently to provide for the due taking of the consent of the infant to a sale of his property, without which consent the sale cannot be ordered (C. S. U. C., cap. 12, sec. 52). This is best secured by taking down the statement made by the infant on his examination, and which statement or examination he should be required to sign, and this is the examination which should be attached to the petition. I need hardly add that it is not necessary, nor would it be proper that the examination of the infant should be taken under oath. As some difference of practice has heretofore prevailed as to the mode of proceeding under this order, I have thought it proper to confer with Vice-Chancellor Proudfoot with reference to it, and he has confirmed the views I have expressed.

(a) See Kerr on Discovery 165, and *Heugh v. Garrett*, 32 L. T. Rep. N. S. 45.—REF.

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THOMPSON v. McCAFFREY.

Partition Act—Infants—Conversion—Character of share of infants after a sale.

When lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty.

[October 19, 1874.—*Proudfoot, V. C.*]

In this case a suit for partition or sale had been brought, and the Court directed a sale, which took place in 1865. The share of one of the persons interested, who was an infant, was paid into Court and invested for his benefit. He died in September, 1874, before attaining twenty-one, unmarried (and necessarily intestate : see Wills Act, 36 Vict. c. 20).

His mother, who was his sole next of kin and also his heir-at-law, now applied for payment of this money to her. She was entitled to the money, *quacumque via*, but if it was to be considered as personal estate she would be obliged to take out administration to her son, which would not be necessary if the money was to be considered as real estate. The amount was small—some \$300, and the matter at issue was only the cost of letters of administration, which it was desired to save.

McArthur for the applicant.

PROUDFOOT, V. C.—The Partition Act, C. S. U. C. cap. 86, sec. 33, directs the infant's shares of the proceeds of sales to be invested for them "until lawfully claimed by them or their legal representatives." The Chancery Act, C. S. U. C. cap. 12, sec. 45, *et seq.*, gives the Court the same jurisdiction as the Court of Chancery had in England in 1850, or as our Common Law Courts have. The English Court then had no power to direct a sale instead of partition ; that has only been given by 31 & 32 Vict. cap. 40 (1868), and in the Acts conferring powers on our Common Law Courts, which are consolidated in the Consolidated Statute, cap. 86, above cited, there is no provision as to the character of the produce of sales other than is contained in the direction to pay to the legal representatives.

In the case of sales of infants' estates for payment of debts, C. S. U. C. cap. 12, sec. 56, there is an express provision that the surplus proceeds of sale shall retain the quality of the property sold. And when Acts of the Legislature give compulsory powers for taking lands, they frequently contain clauses declaring that the price of property sold shall retain the

character of the property which was sold ; and, where they contain no such express provision, they are construed as not intending to alter the nature of the estate. The statute 5 Geo. II. cap. 7, making lands assets for payment of debts, contains no provision as to the nature of surplus on a sale by a sheriff ; but, in *Ruggles v. Reikie*, 3 O. S. 347, the heir was held entitled to sue the sheriff for the surplus. In the *Midland Counties R. W. Co. v. Oswin*, 1 Coll. 80, Knight Bruce, V. C., says : "My present impression is, that upon a reasonable construction of the whole Act, though there are no words precisely and clearly applicable to the case, it was not intended to change the nature or quality in point of devolution of any man's property who was incapable of consenting." It is true that Cranworth, V. C., in *Ex parte Flamanck*, 1 Sim. N. S. 260, rests this decision on the peculiar language of the Act, and himself decided that the effect of the Land Clauses Consolidation Act was to make the proceeds of a lunatic's lands personality. But, under similar statutes, Lord Cranworth's decision has not been followed : *Re Horner's Estate*, 5 DeG. & S. 483, and 16 Jur. 1063 ; a case under a Poor Law Union Act ; *In re Stewart's Estate*, 16 Jur. 1063, under a Manchester Improvement Act ; *Re Taylor's Settlement*, 9 Hare 596, a case under the London Bridge Act. In the Canadian Act, relating to lands required for naval defence (C. S. C. cap. 37, sec. 28, sub.-sec. 4), the character of realty is impressed on the proceeds of sales, as they are required to be invested in lands to be settled to the same uses as those sold.

In the English Act (1868), authorizing a sale instead of a partition, no provision is made on the subject, and there has been no decision involving a conclusion on it. See *Young v. Young*, *France v. France*, L. R. 13 Eq. 173 ; *Davey v. Weitlisbach*, L. R. 15 Eq. 269. An expression of V. C. Wickens, in *France v. France*, that a sale under the Act converted the land into money, does not necessarily mean that the quality of the property is changed.

A Canadian Act, 25 Vict. cap. 104, vested real estate of W. Campbell, an intestate, in trustees, who were empowered to sell and divide the proceeds for the benefit of his heirs, one of whom, John Campbell, was a lunatic, and his share was to be invested for the benefit of John and his representatives. This clause was the subject of decision by the Chancellor, in *Campbell v. Campbell*, 19 Grant 254, who held that the proceeds of the sale

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retained the character of the property producing them; that the omission of a clause declaring the nature of the property when converted, was not a safe ground to infer an intention to alter the devolution of the estate; that the current of legislative provision being to preserve the character of property, notwithstanding conversion, following in that respect the law of the Court, was an equally strong argument against the intention to alter devolution.

By our Chancery Act, when it is necessary to sell a lunatic's land for his maintainance, the surplus retains its original character; and when necessary to sell an infant's lands for a like purpose, the surplus also retains its original character. The same provision applies to both. Neither applies to the case of partition. But if in the case of a sale *necessary* for certain purposes the fund retains its original nature, *a fortiori*, when it is only *expedient* to make the sale must that be so. *Turnbull v. Turnbull*, decided by Strong, V. C., and quoted by the Chancellor, is not applicable for the reason assigned by the Chancellor.

It was suggested, however, that *Steed v. Preece*, L. R. 18 Eq 192 (a), establishes a different rule: I do not so understand it. The Master of the Rolls expressly abstained from deciding the general question, and the consent decree was sufficient to support the actual decision.

The general result is, that where the property is acquired under a deed or other instrument, it will retain the character impressed on it by the instrument, notwithstanding a conversion for a special or limited purpose, although the contest be between volunteers. And, in case of descent, it has the same effect as a deed in passing the real estate to the heir; it comes to him as real estate, and, but for the interposition of the Court, would have retained that character till his death, and devolved in that character. It was not sold with any design of conversion so as to alter the devolution, and the Partition Acts express no design to alter it.

On the whole, I think when lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty; and, in this case, the applicant is entitled to it as heir of her son.

NELSON V. NELSON.

Sequestration—Con. Order 291.

Before resorting to a writ of sequestration under Consolidated Order 291 for non-payment of money, a writ of *fi. fa.* goods should be issued; then, if that fails, an order attaching debts; and a writ of sequestration should only issue (1) where the lands are insufficient to satisfy the debt and it therefore becomes important to realize the profits during the year that must elapse before the lands can be sold under a *fi. fa.*; or, (2) where the interest of the debtor is of such a nature that it cannot be taken under a *fi. fa.* This rule does not interfere with the power of the Court to order a sequestration instead of a *fi. fa.*, if occasion should require.

An order for payment of money into Court is an order for payment of money within the meaning of Consolidated Order 291.

Such an order does not require to be endorsed with the notice, Schedule N. to the Consolidated Orders.

Lands cannot be sold under a writ of sequestration."

[October 22, 1874.—*Proudfoot, V. C.*, on appeal from Referee.]

On the 22nd September, 1874, an order was made restraining the defendants from intermeddling with the estate of Irving Nelson, deceased, and the defendant. Bush was ordered forthwith to pay into Court \$2294.11, being the amount belonging to the said estate admitted by him to be in his hands. This order, which was not endorsed in the manner specified in Con. Order 293, was served on Bush's solicitors the same day, and on Bush personally on the day following.

The defendant Bush's solicitors requested the plaintiff's solicitors not to issue execution for a few days, as he was raising the money on mortgage to comply with the order. To this the plaintiff's solicitors assented, but refused to wait longer than Monday, the 28th September, and on that day obtained an order *ex parte* from the Referee, (made upon reading the order of 22nd September, and the affidavit of service of it, and the depositions of defendant Bush, and the certificate of the Accountant), for a writ of sequestration against the goods and chattels, lands and tenements of defendant Bush. The first was endorsed to levy \$2294.11 and interest, and \$25 for the writ, and on the same day was placed in the sheriff's hands, who seized Bush's property under it.

On the 29th September the plaintiff's solicitors gave notice of motion before the Referee for the 7th October, for an order on the sheriff to sell the goods, chattels, and effects, and the messuages, lands, tenements, and real estate of Bush.

(a) See *Arnold v. Dixon*, L. R. 19 Eq. 113.—Rep.

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On the 3rd October, notice was given by Bush, by leave of the Referee for the 7th, for an order to set aside the sequestration, the copy and service, and the seizure by the sheriff, for irregularity and improvidence, upon grounds set forth in the notice of motion as follows :—

1. That the order does not limit any time for the payment of the money thereunder, at the expiration of and during which the defendant neglected to obey the order according to the exigency thereof.

2. There was no proof given on the granting of the order that the said defendant had neglected to obey said order.

3. No proof was given of the proper service of the order by exhibiting the original thereof at the time of service.

4. There was no proof of any writ of execution against goods or lands of the defendant having been issued and returned "no goods" or "no lands", and the defendant had ample property to meet the amount called for, had an ordinary writ of execution issued.

5. No case was made to dispense with service of a notice of motion for the order for the issue of such writ, and the Referee has no jurisdiction to dispense therewith.

6. Authority to issue the writ of sequestration *ex parte* in the first instance is not given where money is ordered to be paid into Court.

7. The writ of sequestration and the copy thereof, and the copy served were not properly endorsed.

8. An order *ex parte* for the writ of sequestration should not have been granted to enforce an order for the payment "forthwith" of money into Court.

9. And because the writ was endorsed for \$25 costs.

J. A. Boyd, on behalf of the defendant Bush, for the motion, besides taking the points taken on the appeal, argued that "forthwith" was not a limitation of a time, for paying the money, so that defendant could be said to be in default; for these words did not give him five minutes to pay it in.

R. Snelling contra.

MR. HOLMESTED.—The defendant applies to set aside the writ of sequestration on a great many grounds, some of which it is hardly necessary to notice as they are obviously futile. The only points which it is necessary to observe upon are, first, as to the sufficiency of the order limiting the time for the payment of the money. An attempt was made to distinguish this case

from *Thomas v. Nokes*, L. R. 6 Eq. 521, and *Wallace v. Acre*, 2 Chy. Ch. 392, and it was urged that an order to pay money "forthwith" is not a sufficient definition of the time within which the act is to be done, in order to ground an application for a sequestration. In *Thomas v. Nokes*, a deed was ordered to be delivered forthwith, and in *Wallace v. Acre* the plaintiffs obtained an injunction upon the terms that they should forthwith withdraw their defence at law and allow judgment to be signed against them; and it was held in both these cases that this was a sufficient limitation of time within the meaning of Order 293, and the analogous English Orders. I think it is also quite sufficient in the present case. According to the defendant's contention if the Court had allowed the defendant an indulgence of a week, a sequestration might properly have issued on default, but because the Court has thought the defendant is not deserving of any indulgence whatever, a sequestration cannot issue; a proposition to which I cannot accede.

The defendant also contended that the direction being to pay the money into Court, and not to the plaintiff himself, the latter had no right to enforce payment by sequestration, and he relied on *Venables v. Noyson*, 16 Sol. Jour. 574. The order in that case was somewhat peculiar. It was made upon consent, and required the defendant to deposit a sum of money in certain names in a certain bank—not to pay it to any party, nor yet into Court; and it was held that that was not an order for the payment of money, under which a sequestration could issue upon default being made. Here, however, there can be no doubt the order is for the payment of money, and, therefore, distinctly within the letter of Con. Ord. 291.

The case is further aided by C. S. U. C. cap. 24, sec. 20, which declares that the person having the carriage of the order directing the payment of money into Court shall be deemed the plaintiff within the meaning of that Act. But even without this section I think there can be no doubt that the plaintiff could properly obtain a sequestration to enforce compliance with the order. Before 22 Vict. c. 33, (C. S. U. C. c. 24,) the remedy to compel obedience to an order of this kind was by attachment, and also sequestration, and the party having the carriage of the order was the party to issue that process. That statute abolished the process of attachment, and substituted writs of *fit. fa.* It, however, left the remedy by sequestration untouched (see C. S. U. C. cap. 24, sec. 21.) In *Sykes v. Dyson*, L. R. 9 Eq. 228, the order appears to have been a

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similar one to this, and was enforced by sequestration.

It was further objected by the defendant's solicitor that the order for sequestration should not have been granted *ex parte*, but I do not think that is a good ground of objection. Order 291 distinctly gives the discretion to the Judge in Chambers or the Referee to dispense with notice of the application; and, having exercised that discretion, I do not see how the defendant can afterwards object to the plaintiff's proceedings on that ground, unless indeed he be able to shew any concealment of facts from the Court by the plaintiff. I venture to think, however, that the discretion was properly exercised, and that where there is no delay in enforcing the order and nothing has been done by the plaintiff to waive his right, nor by the defendant which could, by any means, be construed into a compliance with the order, it is not, as a general rule, necessary that notice of the application for a sequestration should be given.

It was further contended that an attempt should have been first made by the plaintiff to levy the amount by *f. fa.* before resorting to a sequestration; and it was said that the defendant had ample property to meet the demand. So far as goods and chattels are concerned, I think the defendant's contention is rebutted by the evidence of the sheriff, and that it is clear that the money could not have been made under a *f. fa.* goods. Neither do I think the plaintiff was compelled to exhaust his remedy by execution against the debtor's goods before applying for a sequestration. I am not prepared to say that in every case a sequestration should be granted for non-payment of money, pursuant to the order of the Court, but it does appear to me that this is a case which did justify a resort to that process. The defendant is found to have in his hands a large sum of money to which he has no claim, and for the payment of which the Court has not thought fit to grant him the slightest indulgence. I think the plaintiff was entitled to resort to the most stringent process of the Court to compel the payment of the money, and I think none of the objections taken to the regularity of the writ are of any avail.

With regard to the amount endorsed on the writ to be levied for costs, that is a matter for taxation, and if the defendant desire he can have a reference to the Master to tax the costs in question. As the defendant has paid into Court the amount ordered to be paid in by him, the writ of sequestration may be discharged on payment

of the costs of and incidental thereto, and of this application, and of the application for the examination of the defendant and sale of the goods sequestered; the defendant must also pay the interest which accrued on the \$2294.11, from the date of the order until the same was paid into Court.

A notice of appeal from this order was served for the 19th October, 1874, but the appeal not having been set down, pursuant to Order 591, it was dismissed with costs.

Notice was afterwards given by leave of a Judge to set it down for the 21st October.

Upon the appeal coming on to be heard on that day, it was objected by the counsel for the plaintiff, that a Judge had no power to shorten the period for giving notice under Order 591, which was made in July, 1871, after the consolidation of the Orders; and that the Consolidated Orders 263 and 412, giving a discretion to the Judge, only applied to the Consolidated Orders, after referring, however, to *Burrell v. Nicholson*, 6 Sim. 212; *Coyle v. Alleyne*, 14 Beav. 171; *Boehm v. De Tastet*, 1 V. & B. 327; *Matthews v. Chichester*, 5 Hare, 207; and *Ferrand v. Bradford*, 8 DeG. M. G. 93, he candidly admitted that he could not maintain this objection.

The appeal was then argued on the merits.

J. A. Boyd, for the appeal. The order for the issue of the writ of sequestration should not have been made *ex parte*. The Referee exercised a discretion to dispense with notice under Order 291, without having any facts before him upon which he could judicially exercise it. The order should, under Order 293, have been endorsed with some notice like Schedule N., notifying the defendant that he would be liable to have his property sequestered for disobedience of the order. Orders for payment of money need not, it is true, be endorsed under Order 293; but an order for payment into Court is not within the meaning of "an order for payment of money," referred to in Order 293. One of the analogous English General Orders, (See W. N. 1870, p. 53), made on the Debtors' Act, 32 & 33 Vict. cap. 62, sec. 8, (See L. R. Stats., vol. iv., p. 316), directs that every order requiring a person to do an act shall have a notice similar to the Schedule N. to our Orders, endorsed. Another

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Order allows a sequestration to issue in the first instance, upon default in payment of money; but it has been held that an order for payment of money into a bank was not an order for payment of money within the meaning of those General Orders: *Venables v. Noyson*, 16 Sol. Jour., 574. Similarly an order for payment into Court would not be within the Orders.

The practice with regard to the issue of this writ is governed by the English Orders in force in 1837, and introduced here by statute. (See C. S. U. C., cap. 12, sec. 25). These shew that the writ of sequestration is a writ of last resource, only to be issued when every other process of the Court fails to compel obedience: see Beames's Orders, p. 16; 1 Newland's Pract. 688; 2 Maddock's Chy. Pract. 615.

In cases of default other than for payment of money, Con. Order 289 requires a writ of attachment to issue before a sequestration; and before C. S. U. C., cap. 24, this procedure was also necessary in cases of disobedience of an order for payment of money. While by C. S. U. C. cap. 24, sec. 13, arrest for contempt by failure to pay money was abolished, by sec. 19 power was given to the Court of Chancery to enforce orders directing payment of money by the issue of writs of *fit. fa.* By the same Act (sec. 21), the Court of Chancery was allowed to exercise its powers of sequestration as theretofore. In cases of default in payment of money the attachment in the first instance was thus abolished, but clearly the substituted process, the issue of a *fit. fa.*, should be first employed. The proceedings under Orders 289 and 291 would thus be analogous, as they should be. In practice the course of procedure was: (1) A writ of *fit. fa.*; (2) An attachment; (3) Sequestration *nisi*; (4) Sequestration absolute: See *Re Hassanclever*, 1 Bro. C. C. 434; *Shuttleworth v. Lonsdale*, 2 Cox, 47; *Wyatt's Pract. Reg.* 388-9; *Harvey v. Hall*, 21 W. R. 783; 28 L. T. 734; *Braithwaite Pract.* 239, 137. The order should not be made *ex parte*, and the preliminary issue of a *fit. fa.* should only be dispensed with in case it is shewn that execution would not be made if issued: *Fiskin v. Wride*, 2 Chy. Ch. 212; *Irving v. Boyd*, 15 Gr. 157; *Smith v. McGill*, 3 U. C. L. J. 134; *Harrison's C. L. P. Act*, 2nd ed. 390. See also the Irish cases: *Metiford v. Whitney*, Hayes and Jones 219; *Welsh v. Welsh*, 2 Ir. Eq. 360; *O'Brien v. Foley*, 2 Ir. Eq. 418; *Edwards v. Plunket*, 3 Ir. Eq. 502; *Re Powell*, 7 Ir. Eq. 452. Here the defendant deposes that he had ample property from which the money might have been made by an ordinary *fit. fa.*

The defendant was justified in not paying the sum demanded where the sum to be levied for the writ is exorbitant: *Corbett v. Wallbridge*, 2 C. L. J. 331. Here \$25 was endorsed, while only \$16.80 was taxed.

Lastly, the writ should not have been allowed to remain in force until the costs were paid; this amounted to holding process of contempt over defendant for non-payment of money.

The plaintiff also got costs of a motion to sell the property of defendant both real and personal. This motion as to lands the Referee had no power to grant and no costs of the order should have been given. *Irving v. Boyd*, 15 Gr. 157, shews that lands can not be sold under this writ.

R. Snelling, contra. A distinction is drawn in Daniell's Practice, 924 (*d*), between payment of money into Court and to a person; writs of *fit. fa.* and *elegit* are given as additional remedies to a person, but when the payment is directed to be made into Court a sequestration is the appropriate mode of enforcing the order: Dan. Pract. 924. See *Re Leeds Banking Co.*, L. R. 1 Chy. 150; *Whitehead v. Lynes*, 34 Beav. 116. The depositions of defendant shew that he had a large sum in his hands to which he had no right, and that he was employing it for his own purposes; and that only \$500 of his property was available in execution. It was therefore necessary to proceed against the lands at once. The Court did not allow defendant any indulgence, but ordered him to pay the money forthwith, as a sum which he should have in hand ready to pay at once to the persons entitled to it. These facts justified the Referee in making the order *ex parte*. The ancient practice has been much referred to, but the modern practice, as seen in Daniell, 906, 924, shews that the proceedings in this case were perfectly regular under Order 294.

As to the costs of the motion to sell lands. These were properly granted. Though the motion was never argued, as the money was paid into Court, the motion was rendered necessary and was regular: see *Re Rush*, L. R. 10 Eq. 442; *Meyers v. Meyers*, 19 Gr. 191.

PROUDFOOT, V. C.—Under the former practice the writ of sequestration was the only means of reaching the property of a party to compel obedience to orders of the Court, whether for the payment of money or the performance of some specific act: 3 Bl. Com. 444. In England it had the effect both of a *fit. fa.* and an *elegit*,

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and was more powerful than either, as it affected property they did not reach, and was esteemed a writ of a high prerogative character.

Our Chancery Act, 7 Wm. iv. cap. 2, sec. 6, conferred upon the Canadian Chancery the same powers to enforce obedience to its decrees and orders as the Court of Chancery in England had. In the following year (1 & 2 Vict. c. 110, sec. 20,) the English Court was authorized to issue new writs to give effect to the provision of the Act to be enforced in the same manner as writs of execution were then enforced; and on 10th May, 1839, general orders were made giving forms of writs of *fit. fa.* and *elegit* for enforcing payment of money and costs. In March, 1844, our Court made Gen. Ords. (146-151), authorizing the issue of writs of *fit. fa.* against goods, and against lands, and also writs of sequestration, for the recovery of *costs*. Although limited in this manner to costs it was an exercise of authority apparently not warranted by the 7 Wm. IV., and the orders were abrogated by those of 1850. The 149th Order of March, 1844, directed that the *fit. fa.* against goods and the writ of sequestration might be issued at the same time, and the writ against lands was to issue after the return of the writ against goods. Considering the limited reach of the *fit. fa.* goods at that time and that the *fit. fa.* lands could not issue till its return, this was a proper provision if the power to make it had existed. By the C. L. P. Act of 1856, judgment creditors were enabled to make available for satisfaction of their debts, property and rights which a *fit. fa.* could not reach. In construing this Act the Courts have held that an order for attaching such rights will not be made until the ordinary process by *fit. fa.* has been exhausted: *Smith v. Magill*, 3 U. C. L. J. 134; Harrison C. L. P. Act 390. In 1859 (22 Vict. c. 33, s. 13,) process of contempt for non-payment of money or costs was abolished, and (s. 12,) the Court of Chancery was empowered to issue writs of *fit. fa.* and *ven. ex.* against the property of the person to pay, and to attach debts in the same manner as the Common Law Courts; and by s. 21 the Court might also issue writs of sequestration as hitherto, or in such cases as by general or other order the Court might think expedient; but no writ was to issue from Chancery against the lands of the person to pay. This restriction was removed by 24 Vict. c. 41, sec. 4; but it is remarkable as limiting the force of the very writ which was permitted to issue as hitherto. The form of the writ of sequestration then and still in use directs the sheriff to enter upon all the messuages, lands,

tenements, and real estate whatever of the person to pay, and to collect, receive, and sequester not only all the rents and profits of the same, but also all goods, chattels, and personal estate whatsoever, and to keep them under sequestration until the person to pay had cleared his contempt and the Court made other order to the contrary. The 22 Vict. c. 33, while abolishing process of contempt did not abolish *contempt*, and therefore, the language of the writ requires no alteration. The decision of the Secretary in *Fisken v. Wride*, 2 Chy. Ch. 212, does not, in that respect, seem well founded.

And notwithstanding the dictum of Mowat, V. C., in *Meyers v. Meyers*, 19 Grant 191-2, it seems to me that lands could not be sold under that writ. By the act of 1837 the Court had the same means of enforcing its decrees as the English Court then had, and it is quite clear that lands could not then have been sold under that writ in England. It seems doubtful whether leaseholds could be sold under a sequestration, as there is the opinion of Lord Hardwicke in the affirmative, and of Lord Loughborough in the negative: *Sutton v. Stone*, 1 Dick 107; *Shaw v. Wright*, 3 Ves. 22. Mr. Wyatt, in his Prac. Reg. 390, and Mr. Daniell in his Practice 915, (5th ed.), adopt Lord Loughborough's view, and say there is no instance of any order to sell under a sequestration a subject which passes by title and not by delivery. But this objection does not stand in the way of a sale of chattels which pass by delivery. The 22 Vict. contained the power to issue the writ as hitherto. And the writ itself directs the officer to collect and sequester the rents and profits. Nor is it necessary that this effect should be given to it, as a writ of *fit. fa.* land may issue for that purpose.

The very much enlarged operation given to the *fit. fa.* goods, and the power of attaching debts have shorn the sequestration of much of its former peculiar efficacy, but it is still a powerful engine for compelling obedience, as it enables the creditor to enter into *immediate possession* of all the real and personal estate of the debtor, which, as regards the real estate at all events, could not be done under the *fit. fa.* lands. The Con. Order, 288, *et seq.* regulate the mode of compelling obedience by this writ. Where the order directs the doing of an act other than the payment of money, on default, an attachment issues on *praeceipe*. If the party is taken on the attachment and refuses to obey the order; or if he is out of the jurisdiction, or absconds, or cannot be found, then a sequestration issues.

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Where the order is for payment of money application is to be made in Chambers for a writ of sequestration, and upon proof of service of a notice of motion, unless the Court thinks proper to dispense with the service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a sequestration to issue. Order 293 provides that every order requiring performance of an act other than the payment of money is to be endorsed with a notice warning the defendant that his non-compliance would render him liable to arrest, and to have his property sequestered.

The Orders under the English Debtors' Act, 1869, are somewhat similar. The first directs that every order requiring a person to do an act shall be endorsed with a notice that in event of disobedience he would be liable to have his property sequestered. This is wide enough to include an order for payment of money. The third provides, on an order for payment of money being disobeyed, for the issue of a sequestration by the Clerk of the Records and Writs without any special order, upon production of evidence to the same effect as that which would heretofore have been required on issuing an attachment.

I think that an order for payment of money into Court is an order for payment of money within our General Order, and, therefore, does not require to be endorsed. *Sykes v. Dyson*, L. R. 9 Eq. 228, was referred to, but proves very little. It merely shews that the English Debtors' Act accomplished its purpose of permitting a sequestration without an attachment against the person. As to the endorsement it was made under the Consolidated Orders, the special orders under the Debtors' Act not having then come into force: under either it had to be endorsed, in which it differs from our Order. But it is said that *Venables v. Noyson*, 16 Sol. Jour. (1872), 574, shews that an order for payment into a bank is not an order for payment within the English Orders on the Debtors' Act, 1869. A motion had been made for a receiver, the defendant having got possession of £1,800 to which plaintiff laid claim, and an order by consent taken for depositing in a bank, in certain names, £1,000, the defendant to account for the £800 residue. *Bacon, V. C.*, held that an order for deposit was not an order for payment. This was not a case of payment into Court—the title to the fund seems not to have been clear—and it was to be deposited in certain names, apparently to await the issue of ulterior proceedings. Not at all like

this case were the defendant's want of title is admitted and the money is to be paid into Court.

Our Orders never contemplated the issue of this writ on *præcipe*, and in *Fisken v. Wride*, 2 Chy. Ch. 212, the late Chancellor held that the registrar had no authority to issue it on *præcipe* even where a *fi. fa.* had been returned *nulla bona*. The Order requires application to be made in Chambers, and, on notice of motion, unless dispensed with by the Court, and contemplates the proof of other matters being required, all these shew that the issue of this writ is not a matter of course and requiring merely formal proof. And considering that under the *fi. fa.* goods, and order attaching debts, and the *fi. fa.* lands, nearly everything obtainable by sequestration can be had, except the immediate possession of the lands, I think that following the analogy of proceedings at law the *fi. fa.* goods should be first used, then the order attaching debts, and that a sequestration should only issue when the lands are insufficient to satisfy the debt, and it therefore becomes of importance to realize the profits during the year that must elapse before they can be sold under *fi. fa.*; or where the interest of the debtor is of such a nature that it cannot be taken under a *fi. fa.* The creditor can protect himself, as he has the power of placing *fi. fa.* goods and *fi. fa.* lands in the sheriff's hands at the same time: C. L. P. Act, s. 252; *Harrison*, 358.

In the present case I think the Referee should not have dispensed with the notice of motion. It was stated that the reason which led him to dispense with it was that Bush, on his examination before an examiner, stated that he had collected money belonging to the intestate's estate; that in so doing he was acting as agent for the intestate's widow; that he had upwards of \$2,038 in hand, not in any bank, not invested, which he had made use of as he wanted, and mixed it with his own moneys. This was all very improper conduct on Bush's part, and was the ground for the order directing him to pay the money into Court. But during the same examination he said he was not under many obligations in comparison with the value of his property; that he was not in embarrassed circumstances; that he had plenty of property; and his solicitors had assured the plaintiff's solicitors that he was raising money on mortgage which would be ready in a few days. The correspondence on this subject was not produced to the Referee, and it might probably have led him to a different conclusion.

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I think, therefore, both on the general rule and under the circumstances of this particular case, that the writ of sequestration was improperly issued, and that the order of the 8th October must be reversed, with costs.

This does not at all interfere with the power of the Court to order a sequestration instead of a *f. fa.*, if occasion should require.

Appeal allowed.

HORKINS v. HARTY.

Guardian ad litem.

A suit was brought for redemption of mortgaged property, and the mortgagee having died, his widow and infant heirs were the defendants. Upon an application for the appointment of a guardian *ad litem* to the infant defendants, a solicitor, nominated by the mother, was appointed guardian, it being considered that there could be no conflict of interest between the mother and her children.

[October 26, 1874.—*Poudfoot, V. C.*, on appeal from *Referee.*]

This was a suit for the redemption of mortgaged property, notwithstanding an order dismissing a former bill for the same purpose, after a report had been made finding a sum due, and fixing a day for payment. The mortgagee having died intestate, his widow and infant heirs were defendants, and this motion was for an order appointing a guardian *ad litem* to the infant defendants.

J. H. Macdonald, for the plaintiff.

J. S. Ewart appeared, and, on behalf of the mother of the infants, asked that Mr. O'Reilly, Q. C., her relative, be appointed.

MR. HOLMESTED.—It may be to the interest of the widow to consent to a redemption, as in that case she would be absolutely entitled to one-third of the redemption money. Whereas, if redemption be resisted, she would only have her dower, which may not be so valuable; there may, therefore, be a conflict of interest between the mother and children, and therefore the nominee of the mother should not be appointed.

An order was made appointing Mr. Hoskins, Q. C., guardian.

This order was appealed from.

MacLennan, Q.C., for the appeal.

No one appeared for the plaintiff.

PROUDFOOT, V. C.—Both mother and children are equally interested in resisting redemption, and there is no conflict of interest between them. I think it unnecessary to increase the costs of the suit by having separate solicitors for the mother and children. I therefore allow the appeal, and appoint Mr. O'Reilly.

Appeal allowed.

BOWSLAUGH v. BOWSLAUGH.

Alimony—Postponing hearing.

The usual undertaking given by the plaintiff on obtaining the order for interim alimony (viz., to proceed to a hearing at the first possible sittings), was extended to the next sittings, where the defendant had failed, and wilfully refused to pay interim alimony and disbursements which he had been directed to pay.

[October 27, 1874—*Referee.*]

The plaintiff in this case applied to be relieved from the usual undertaking given by her on obtaining the order for interim alimony, viz., to proceed to a hearing at the next sittings, on the ground that the defendant had failed to pay the interim alimony and disbursements ordered to be paid by him, and wilfully refused to pay the same, so that the plaintiff was left without the means of bringing the suit to a hearing.

George Murray for the plaintiff.

J. Downey, for the defendant, cited *Howe v. Grey*, W. N. (1867) 141; and *Levi v. Heritage*, 26 Beav. 560.

MR. HOLMESTED.—The plaintiff has been awarded \$8 per month for interim alimony, and the defendant appears to be a young man and well able to earn sufficient, over and above what is necessary for his own maintenance, to pay that sum, and the affidavit he has filed fails to remove from my mind the impression that he wilfully withholds payment. The plaintiff's application is not entirely without precedent, as I find by the case of *Bird v. Bird*, 1 Lee 572, that a somewhat similar application was there entertained. That was a suit brought by the husband for nullity of marriage: he was ordered to pay alimony *pendente lite*, and it was ordered that such alimony should be paid by him before he should be allowed to bring his cause to a

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hearing. I think, therefore, in the present case it would be proper to extend the plaintiff's undertaking to the spring sittings.

The costs will be costs in the cause.

Application granted.

CAISSE V. BURNHAM.

Leave to appeal from Master's report—Delay.

Although a party may appeal from the Master's report at any time after it is signed, he cannot be considered guilty of laches in proceeding to appeal until the expiration of the time within which he may appeal as of right, viz., fourteen days after the filing of the report.

Leave granted to appeal after the expiration of the fourteen days, it being considered that the delay in appealing was sufficiently accounted for, and that a *prima facie* ground of appeal was shewn.

[November 2, 1874—*Proudfoot, V. C.*,
on appeal from the *Referee.*]

Motion for leave to appeal from the Master's report.

The report was made on the 24th June, 1874. After the making of the report the defendant wrote to his agents in Toronto, requesting them to watch for the filing of the report and apprise him when the same should be filed. On the 22nd August his agents wrote, saying that the report had not then been filed, and promised to let him know as soon as it should be filed. On the 16th September they again wrote to him to say that the report had not been filed. On the 5th October the defendant wrote to his agents again to be careful to let him know when the report should be filed; and on the 7th inst he received a reply from them, stating that the report had been filed on the 21st September. On the 9th October the defendant gave notice of the present application.

A. J. Cattanach for defendant.

C. Moss contra.

Mr. HOLMESTED—There has been no delay on the defendant's part in moving so soon as he had become aware that the report had been confirmed. Nevertheless I do not think the defendant has sufficiently excused his laches. Under Con. Order 253, a party is entitled to appeal at any time after the signing of the report until the

expiration of fourteen days from the filing of the same. He is not under any necessity to wait until his adversary has filed the report before appealing, and I am not aware that it is even necessary that the report should be filed at all, in order to entitle a party to appeal; but if it be necessary, Order 254, enables any party affected by the report to file the report himself. The defendant assigns no satisfactory reason for his delay from the 24th June until the 7th October in prosecuting his appeal.

Neither has he, in my judgment, made out that *prima facie* case on the merits which it is necessary he should do in order to obtain the leave to appeal he now asks. In *Dickson v. Avery*, 3 Chy. Ch. 223, Strong, V. C., said—“On a motion like the present I am of opinion that it is necessary to show a *probable ground of appeal*. I cannot subscribe to the rule laid down in *McQueen v. McQueen*, 2 Chy. Ch., that it is only necessary to account for the delay. The Judge should look at the facts and exercise his judgment in the case, not certainly as if he had to dispose of it, or finally decide it, *but to the extent of ascertaining if there exists any reasonable or probable grounds of appeal.*”

Now, what does the defendant say here? In his first affidavit he says—“I verily believe that I have good grounds on which to appeal from the report, and I say that I am not indebted to the said plaintiff in any sum whatever.” Being apparently conscious that this is quite insufficient, he makes a further affidavit. And he says “that the Master has charged me in his report with several sums *paid by the plaintiff to me*, and also a note for \$100 *for which I had given the said plaintiff credit in my account*, and also with two other sums *which I had received for the said plaintiff*, but which I paid over to her upon her giving me receipts therefor, and which she admitted to Elias Burnham I had paid her, the said plaintiff; and also with the sum of \$350, the proceeds of a note which I never received, wrongfully and contrary to evidence and the weight of evidence. That I have good grounds on which to appeal from the said report, and I say that I am not indebted to the said plaintiff in any sum whatever.”

It will be observed that the concluding clause of the defendant's affidavit is so framed that he abstains from saying that he believes he has good grounds to appeal in respect of the matters stated in the previous part of his affidavit, and it would therefore be consistent with the defendant's affidavit that although the Master might

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have charged the defendant with the items he alleges, yet that the defendant does not himself believe that he has any good ground for appealing from the Master's report in respect of these items. On the argument of the motion I asked the defendant's solicitor if he desired to have the papers in the Master's office produced, but he declined that proposition. I am, therefore, left to dispose of the motion on the material now before me, and I confess that I am unable to see from the defendant's affidavits that he has any reasonable ground of appeal. He says the Master "has charged him with several sums paid by the plaintiff to me, and also a note for \$100, for which I had given the plaintiff credit in my account, and also two other sums which I had received for the said plaintiff, but which I paid over to her, and also with the proceeds of a note which I never received." The defendant seems by his affidavit to suppose that he should not be charged with moneys which he admits he has received simply because he has given the plaintiff credit for them or paid over the amount to her. But, inasmuch as he admits the first class of items were actually received by him, it is quite clear that the Master was right in charging him with them; whether the defendant is entitled to credit for payments made by him to the plaintiff is another matter. At all events, he does not shew any grounds of appeal on that ground. With regard to the proceeds of the note which he says he has been charged with, but which he never received, the probable ground of appeal is no stronger, because on referring to the report I find the Master assumes to charge the defendant not only with what he actually received, but also with what *but for his wilful neglect or default he might have received*. It may be that the item in question is charged against the defendant because he might have received it but for his wilful neglect or default, and the defendant's affidavit fails to negative that position. I think, therefore, no probable ground of appeal has been shewn, so that on both grounds which I have referred to this application must be refused, with costs.

The defendant appealed.

A. J. Cattanach, for the appeal.

C. Moss, contra.

PROUDFOOT, V. C.—I think the defendant must have leave to appeal. Laches is out of the question till the expiration of the time within

which he might have appealed, or fourteen days after filing the report. He swears to his intention of appealing from the time the report was signed, and instructed his agents to keep watch when it should be filed, and inform him; and these instructions were from time to time repeated. So that I find no lack of vigilance in the defendant, no evidence of sleeping on his rights, or of acquiescing in the accuracy of the report. Through the mistake or negligence of his agents he was not informed of the filing of the report till after the lapse of more than fourteen, I think sixteen, days, and immediately gave notice of leave to appeal. I think the delay is sufficiently accounted for.

Assuming it to be necessary on an application of this kind to shew a *prima facie* ground for appeal—not to establish conclusively that the Master has gone wrong, but that there are questions fairly arguable, I think the defendant does so here. The two affidavits made by the defendant should be read together, and the fair construction of them is, that the "good grounds of appeal" sworn to in both, refer to the specific items mentioned in the second. Some of these are not mentioned with such precision as to require an answer from the plaintiff; but the defendant does point out that the Master charged him with a note for \$100, for which he had given the plaintiff credit in his account, and also with the sum of \$350, the proceeds of a note which he never received. Had the plaintiff said in answer to this that the defendant was not charged with the \$100 note beyond the credit he had given for it, and had she denied that he was charged at all with the \$350 note or its proceeds, there would have been some ground for the argument that the defendant's affidavit was designedly ambiguous. But she does not say so. She meets the charge with a very general denial, saying that "the various accounts and dealings between the defendant and myself were fully investigated before the Master, and I am convinced and do verily believe that the defendant received in the computation made by the said Master credit for all payments made by him and was not charged with any amount for which he was not justly liable." And the affidavit of Mr. Martin, who acted for the plaintiff's solicitor in taking the accounts before the Master, is as general. He says "that the various accounts and items between the plaintiff and defendant were carefully and fully investigated before the Master, and he believes the report to be the result of a just and true comparison of the same." Both these statements seem to admit that the defend-

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ant was charged with those items, and it is quite consistent with them that he was erroneously so charged, but that on a *comparison* of the whole account the report was right. Mr. Martin must have known how the Master dealt with these items, and yet I never saw a vaguer or more unsatisfactory way of explaining the report regarding them. It was the Master's duty to *investigate* the items of the accounts between the parties; but what is meant by a *comparison* whether *just and true* or otherwise, I am at a loss to comprehend. It is suggested that the charges may have been made under the *wilful default* clause in the decree. It is not so said in the report, nor in the affidavits filed on behalf of the plaintiff; and were it so in fact, so far from being a reason for refusing leave to appeal, it would, in my estimation, be a very strong ground for granting it. Question of liability for *wilful default* involve some of the most intricate matters in taking accounts, and to shut out the defendant from having the decision reviewed by the accident of the time for appealing having elapsed would be a very hard measure indeed.

It is contended, however, that there having been a conflict of testimony the Master's decision will not be reversed on the principle acted on in *Day v. Brown*, 18 Gr. 681. I assent to the correctness of the rule laid down there, and have acted on it in several cases. But I am not aware that there was any conflict of evidence except from what appears in the affidavits of the plaintiff and Mr. Martin—the plaintiff saying that she believes from the manner in which a witness for the defendant gave his evidence that the Master placed little or no reliance thereon; and Mr. Martin saying, in regard to the same witness, “judging from the manner in which his testimony was given, I do not think the Master gave much credence to it.” Neither of them says, as a matter of fact, what influenced the Master, but they only speak of their own belief on the subject. It is true that the defendant's second affidavit says he was charged wrongfully and contrary to evidence and the weight of evidence. He might be wrongfully charged although there was no conflict, and although the witness referred to had never been examined.

The defendant will, of course, have to run the risk of *Day v. Brown* preventing him from succeeding on his appeal; but on the materials before me I do not see evidence of a conflict of the kind there adjudicated on.

Appeal allowed with costs.

BROWN V. CAPRON.

Discovery and production—Married woman.

A suit was brought by a married woman to which her husband was joined as a defendant. The plaintiff filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matters in question in the suit. The defendant applied to compel further production, viz., of documents which, it appeared, the defendant, the plaintiff's husband, had in his possession. It was alleged that he held these documents for the benefit of the plaintiff, and that it was intended to use them at the hearing.

- Held.* 1. that the possession of the husband could not be said to be the possession of the wife.
 2. That a better affidavit will only be ordered upon proof of admission, under oath, by the party against whom the application is made, of having other documents in his possession besides those already produced.
 3. That a *feme covert* plaintiff, whose husband is a defendant, is not bound to procure production of documents by her husband for the benefit of his co-defendants.
 4. That the rule respecting the obtaining of discovery from a co-defendant protected the plaintiff's husband from liability to examination by his co-defendants.

[November 10, 1874.—*Referee.*]

This was a suit brought by a married woman in which her husband had been made a party defendant. The defendants, other than the husband of the plaintiff, obtained an order for the plaintiff to produce, and in answer to that order the plaintiff filed an affidavit in the usual form.

The defendants, other than James Brown, the husband of the plaintiff, now applied: 1st. To compel plaintiff to file a better affidavit, or in default that she be committed; or, 2nd. To compel her to produce or allow the applicants to take copies of, or extracts from, all documents, &c., in the possession of the defendant James Brown, or which the plaintiff had access to, or copies of; 3rd. That the plaintiff should be required to compel Brown by proper process to produce all documents, &c., in his possession, &c.; and that the applicants might be at liberty to inspect and take copies of, or extracts from the same; 4th. Or for an order giving the applicants liberty to cross-examine their co-defendant, James Brown, and that he might be ordered to produce all documents, &c., with liberty to applicants to inspect and take copies, &c.

The application was supported by the joint affidavit of the defendants' solicitor and his clerk, from which it appeared that the solicitor

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was informed and believed that the defendant Brown had in his possession or power divers letters, &c. of the late Hiram Capron in the pleadings mentioned addressed and sent to the defendant Brown touching the matters in question, which letters, &c., he held in the interest and for the benefit of the said plaintiff, and which were intended to be used at the hearing on the part of the plaintiff, and that the deponent was informed and believed it to be true, that these letters were written and sent to Brown because he was the husband of the plaintiff, and that he so held the same. In addition, Mr. Webster, the solicitor's clerk, stated that on the 24th of September last, subsequently to the swearing of the plaintiff's affidavit on production, the plaintiff's solicitor and defendant Brown both admitted that the latter had in his custody divers letters, &c., from the late Hiram Capron to the said Brown which were intended to be produced and used at the hearing.

F. Arnoldi for defendants, other than Brown.

W. N. Miller for plaintiff.

MR. HOLMESTED.—In *Wright v. Pitt*, L. R. 3 Chy. 809, it was held that a motion for a better affidavit must be supported by proof of admission under oath by the party against whom the application is made of having other documents in his possession besides those produced : see *Alcock v. Gill*, 21 L. T. N. S. 704. Here the papers fail to shew any such admission on the part of the plaintiff, and I think the application must fail on that ground so far as it seeks to compel the plaintiff to file a better affidavit or to produce the letters in question. The possession of the husband cannot be said to be the possession of the wife.

It was urged that the affidavits shewed that the letters in question had been handed by the defendant Brown to the plaintiff's solicitors, and it was urged that the defendant having obtained discovery in this way by the voluntary act of Brown she could be compelled to make discovery to the defendants now applying, and the case of *Reynolds v. Godlee*, 4 K. & J. 88, was relied on.

In the first place I do not think it is made out that the documents in question ever were handed to the plaintiff's solicitors ; and in the next place in *Reynolds v. Godlee* the document of which production was sought was admitted to be in the plaintiff's possession, and here there is no such admission, which is sufficient to distinguish that

case from the present. Here the defendants contend that where a suit is brought by a *feme covert* she is bound not only to make an affidavit on production herself, but she must also procure one to be made by her husband. No case has been cited which can be said to be an authority for that proposition, and I do not think it is warranted by the practice of the Court. In the *Princess of Wales v. The Earl of Liverpool*, 1 Sw. 114, the suit was stayed until the plaintiff produced certain documents. But Sir James Stuart, in *Hardwick v. Wright*, 2 Jur. N. S. 297, to which I shall presently refer, declared that Lord Eldon had ordered the documents to be produced in an indirect manner, although he had no authority to do it, and that it was an extraordinary mode of doing justice. That case, therefore, cannot be considered any authority for the present application. In *Attorney-General v. Clapham*, 10 Hare, App, 68, and *Wynne v. Humberston*, 5 Jur. N. S. 5, it was held that before decree a defendant is not entitled to an order for production against his co-defendant, nor has he, it seems, the right to inspect documents produced by his co-defendant under an order for production obtained by the plaintiff : *Bartley v. Bartley*, 16 Jur. 1062. I have not been able to find that the fact that a defendant happens to be the husband of the plaintiff makes any difference in the rights of his co-defendant in this respect. The argument founded on the relationship of the parties would apply with about equal force to any other friendly party defendant who might happen to have documents in his possession likely to assist the plaintiff's case ; and also to her next friend by whom she brings the suit.

I find in England it has been expressly held that neither the husband of a plaintiff who is a *feme covert*, nor her next friend by whom she brings the suit, can be required to make an affidavit on production, at the instance of the defendants : *Hardwick v. Wright*, 11 Jur. N. S. 297.

I do not think our General Order 134, though more generally worded, is intended to give defendants any greater right than they have under the Imperial Act, 15 & 16 Vict., cap. 86, sec. 20.

The defendants, however, seek to accomplish by a circuitous process what they cannot do directly ; but I think I should be establishing a novel practice if I were to order this plaintiff to take proceedings against her husband in order to compel him to make discovery of the documents in his possession for the benefit of his co-defendants.

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BLOOMFIELD V. BROOKE.—RIDDELL V. RITCHIE.

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The application to examine the defendant Brown is governed by the same rule as that which governs a defendant's right to discovery from a co-defendant, and must also be refused.

The motion must be refused with costs.

BLOOMFIELD V. BROOKE.

Shortening time to answer.

The time allowed by Consolidated Order 90 to a defendant residing in the Isle of Man for answering a bill being six months, an order was granted shortening the time to ten weeks, in view of the facility of communication with the Isle of Man, it being geographically, though not strictly, within the United Kingdom.

[November 16, 1874.—*Chancellor.*]

J. S. Ewart moved for an order limiting ten weeks as the time within which a defendant, who lived in the Isle of Man, should file an answer to the bill.

The defendant in question lived in the Isle of Man, which was not strictly within the words "any part of the United Kingdom," in Consolidated Order 90, clause 4, so that defendant would, under clause 5 of Order 90, have six months within which to answer : this, considering the facilities of communication with the Isle of Man, was longer time than was necessary.

The practice with respect to shortening the time for answering was in an unsettled condition. Under Consolidated Order 412, the Court seemed to have the jurisdiction in a proper case, and in *Western Canada B. S. v. Smith* (Mr. Taylor, Referee, Dec. 1872), an order had been granted in the case of a defendant resident in Manitoba. In *Young v. Ullman*, however, (Mr. Holmested, Referee, Feb. 14, 1874) where the defendant was living in California, an order had been refused. In this latter case, the Referee had consulted with the Chancellor, who considered that although the fact that communication with California was more easy now than it was when the General Order 90 was promulgated might form a reason for passing an entirely new General Order, it was no reason for altering the time limited by the Order. This opinion was followed by Proudfoot, V. C., in *Quantz v. Smeltzer* (August 31, 1874).

This motion was originally made before the Referee, but was adjourned by him before a Judge in order that the practice might be settled.

SPRAGGE, C.—The defendant, as to whom service is asked, resides in the Isle of Man ; and a special order is asked by reason of that place being, it is said, not strictly within the United Kingdom. It is really so geographically. I think the order may properly go.

Order granted.

On the 3rd December, 1874, in a case of *Koen v. Koen*, where a defendant lived in Wyoming territory, with which communication was tolerably easy, *Ewart* moved for an order shortening the time for answering, and the Referee, on the authority of *Bloomfield v. Brooke*, *supra*, made an order limiting eight weeks instead of the six months allowed by Order 90.

RIDDELL V. RITCHIE.

Abatement by insolvency of sole defendant—Dismissing bill.

A sole defendant, by whose insolvency the suit has abated, may nevertheless move to dismiss the bill for want of prosecution.

[November 18, 1874.—*Referee.*]

N. W. Hoyles moved to dismiss the bill for want of prosecution.

W. A. Foster, contra, for the plaintiff. The defendant is the sole defendant, and the suit has abated by his becoming an insolvent. He cannot move to dismiss.

Hoyle, in reply, cited *Monteith v. Taylor*, 9 Ves. 615; *Robson v. Earl of Devon*, 3 Sm. & G. 227; *Levi v. Heritage*, 26 Beav. 560; *Blackmore v. Smith*, 1 Mae. & G. 80.

MR. HOLMESTED made an order dismissing the bill.

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SMALL v. UNION PERMANENT BUILDING SOCIETY.

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SMALL v. UNION PERMANENT BUILDING SOCIETY.

Compromise of suit—Dismissing bill.

A compromise of a suit having been entered into before answer, the defendant may set up the compromise in his answer, and pray, by way of cross-relief, that it be specifically performed; and if the plaintiff does not diligently proceed with the suit, the defendant is enabled to move to dismiss for want of prosecution.

[November 23, 1874.—*Chancellor*, on appeal from *Referee*.]

This was a suit for redemption. A valid agreement for the compromise of the suit had been entered into. Some little dispute appeared to exist as to its precise terms, but it was admitted that they were to be collected from certain letters of the plaintiff's solicitor and the defendants' former solicitor. This agreement for a settlement had been arrived at in September, 1873, but the plaintiff being negligent in carrying out his part of the settlement, the defendants, after some correspondence, filed an answer on the 11th September, 1874, in which they set up as a defence their version of the compromise, and claimed that it should be carried out. The plaintiff not having proceeded to bring the cause to a hearing, the defendants now moved to dismiss for want of prosecution, with costs.

J. S. Ewart for the defendants.

F. Arnolli, contra, for the plaintiff.

MR. HOLMESTED.—It appears to me that the defendants have entirely misconceived the practice, and that this motion must be refused, with costs.

After consulting the only authorities I have been able to find on the subject (none having been cited to me by either of the solicitors who argued the motion), the conclusion I have drawn from them is this, that where an agreement to compromise a suit is come to after bill filed, and notwithstanding such agreement, the plaintiff insists on prosecuting the suit for his original demand, it is then open to the defendant to file an answer, setting up the alleged compromise as a bar to the further prosecution of the suit; or he may pray, by way of cross relief, to have the agreement of compromise specifically performed (see Con. Order 126); or he may file a cross bill for that purpose (Mitford on Pleading, p. 82); or he may apply on petition to stay proceedings; or he may (where the compromise does not affect the rights of persons not parties

to the cause, so as to prevent the Court safely dealing with the question in that way) apply on petition in the suit for an order to carry out the terms of the compromise: *Dawson v. Newsome*, 6 Jur. N. S. 625: *Tebbutt v. Potter*, 4 Hare 164. If, however, the plaintiff does not attempt to carry on the suit, and remains quiescent, and the defendant desires to have the compromise carried into effect, his course is either to present a petition in the cause for that purpose, or file a bill for specific performance of the compromise. But an answer in the original suit, I think, cannot, in such a case, be properly filed; at all events, I can find no case in which that mode of proceeding has been adopted. In the present case the plaintiff is not prosecuting the suit, and it was no part of the agreement that the suit should be prosecuted, or a decree obtained. It is the defendants who are desirous of forcing the suit on, and I think that it is not open to them to do so. After the agreement of compromise of September 23, it being admitted to be a valid and binding agreement on both sides, the right of the plaintiff further to prosecute this suit was gone, and both parties had thenceforward to stand by the arrangement then come to. The plaintiff did not, as in *Rowe v. Todd*, 1 J. & W. 315, attempt to carry on the suit in spite of the compromise; there was no occasion for the defendants to file an answer. Their doing so appears to me to have been a superfluous proceeding, and not warranted by the circumstances. Some analogy has been attempted to be drawn between the defence set up by the defendants' answer and a plea of *puis darrein continuance* at law, but I do not think the analogy can hold good, as I feel quite clear that a defendant could not, at law, after a settlement of an action had been agreed upon, put in a plea of this kind, and force the plaintiff to carry the cause down to trial. Although I am equally clear that if the plaintiff, after a settlement, attempted to carry the suit to trial, ignoring the settlement, the defendant might properly enough plead such a plea.

The plaintiff's solicitor offered on the argument either to amend his bill by setting out his version of the compromise, and set the cause down for hearing at the next sittings; or, if the defendants would amend their answer, so as to set out the true agreement, he offered to hear the cause forthwith, or bill and answer, or by way of motion for decree, in order to obtain the decision of the Court for the performance of the settlement agreed to. The defendant's solicitor, however, rejected both of these offers, and I

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can therefore only dismiss this application with costs.

From this decision the defendants appealed.

SPRAGGE, C.—I agree with the Referee that a compromise entered into between parties in the course of a suit may be set up by a defendant in answer to a suit, and that, under General Order 126, cross relief in respect of it may be prayed by the answer. But I am unable to follow the reasoning by which he arrives at the conclusion that a defendant filing such an answer cannot move to dismiss for want of prosecution.

The argument is, that it was no part of the agreement of compromise that the plaintiff should continue to prosecute the suit, and that it is the defendant, not the plaintiffs, who is forcing on the prosecution of the suit. It is true that in *Rowe v. Wood*, 1 J. & W. 315, the plaintiffs continued to prosecute the suit after a compromise, and it was to that that the plea in that case was directed, which, for the reasons given in the judgment, was held not to be a good plea.

I gather from the judgment that, in the opinion of Lord Eldon, pp. 346-7, an agreement of compromise might have been set up by answer, and that is all that could have been done by the English practice.

If such agreement could have been set up by answer, and were set up, I see nothing in it to debar the defendant from his ordinary right of having the suit prosecuted, or, in default, of having the bill dismissed. And, if he had desired the specific performance of the agreement, and were entitled to it, I see nothing to prevent his having, as part of his relief, the bill in the original suit dismissed; and so, by our practice, where the object of the cross bill may be obtained by answer, the defendant, *pari ratione*, would be entitled to a dismissal of the bill.

To follow out the reasoning of the Referee to its legitimate consequences, a defendant ought not to be entitled to an order of dismissal for want of prosecution, wherever, upon an answer being put in, the plaintiff desires not further to prosecute his suit; and the desire to carry it on to a conclusion exists on the part of the defendants instead of himself. The defendant having prayed for cross relief can make no difference in the obligation on the part of the plaintiff to prosecute his suit diligently. If the defendant

for want of such diligent prosecution moves to dismiss, he forgoes a part of his remedy. If he is content so to do, it cannot in reason deprive him of his ordinary right to get out of litigation, if the litigation against him is not diligently prosecuted. It is argued that by the agreement of compromise the plaintiff's right further to prosecute was gone, but that is precisely what the defendant sets up. He could not know beforehand whether the plaintiff would acquiesce in what he set up being the true agreement; and, in fact, the plaintiff did not so acquiesce, or the plaintiff might, as was suggested in *Rowe v. Wood*, have set up that it was obtained by undue means.

I fail to see any sound reason why this, which is a fact in the cause, should not be set up as a defence to it by answer. The defendant having it in his power to avail himself of it by petition, is no reason against the course taken. He might proceed by petition if the agreement of compromise had been after answer. Having been before answer, he might properly, as I conceive, set it up by answer.

Nor do I see that it at all affects the right of the defendant, that it was no part of the agreement of compromise that the suit should be prosecuted or a decree obtained. His point was that this agreement was an answer to the suit, and he was equally entitled to set that up as a defence, whether the agreement contained such a provision or not.

I am of opinion that the defendants were entitled to take the course they did, or to petition; and, being of that opinion, I think they were entitled to the costs of the application whether it was granted, or the indulgence asked for obtained. Looking at the delay and the correspondence, the granting what was asked would have been an indulgence. The defendants are entitled to the costs of this appeal.

The parties inform me that they are agreed as to the terms of the agreement of compromise, and that it is to be carried out by written agreement, without decree. A week will be sufficient for that purpose. At the end of that time the bill is to be dismissed, unless it should be made to appear that obstacles are thrown in the way of its being carried out, by the defendants.

Appeal allowed.

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McCORMICK v. McCORMICK—WHITE v. WHITE.

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McCORMICK v. McCORMICK.

Foreclosure—Notice to defendant in Master's Office where bill pro confesso

As a general rule notice of the proceedings in the Master's Office, should be served upon a mortgagor against whom the bill has been taken *pro confesso* whenever the plaintiff proves a claim in addition to that alleged in his bill.

[November 26, 1874.—*Referee.*]

This was a foreclosure suit. The plaintiff filed her bill on a mortgage claiming by the indorsement on the bill \$2400 and interest, and a decree was obtained *pro confesso*, with reference to the Master at Belleville. On the reference the plaintiff proved, in addition to her claim on the mortgage, a further claim of \$381 under an execution in the sheriff's hands. It appeared from the report that no notice was given to the defendant of the proceedings in the Master's Office.

An application was now made for a final order of foreclosure.

MR. HOLMESTED.—*Robinson v. Whitcomb* 20 Gr. 415, shews that the Master should not, as a matter of course, dispense with service of notice on a defendant against whom a bill has been taken *pro confesso*, but that he should exercise his discretion in each case. I have consulted the Master as to the mode in which he exercises this discretion, and he tells me that, as a general rule, he requires notice to be served on a mortgagor against whom a bill has been taken *pro confesso*, whenever the plaintiff proves a claim in addition to that alleged in his bill, or whenever subsequent incumbrances are added in the Master's Office. I think this rule should also be observed by the Masters in the country, and as the defendant had no notice of the proceedings in the Master's

Office, I think notice of the motion for the final order should be served upon her.

The consent of the defendant being afterwards produced, the order was made.

WHITE v. WHITE.

Lis pendens—Alimony suit.

A certificate of *lis pendens* should not be issued in a suit brought for alimony only.

[November 30, 1874.—*Referee.*]

Motion by defendant to discharge a *lis pendens*.

Davidson Black for the defendant. The suit is for alimony only, so that no question is raised respecting an interest in lands (see Con. Stat. U. C. cap. 12, sec. 64). The issue of this *lis pendens* is an abuse of the process of the Court.

Huson Murray for the plaintiff. If the *lis pendens* is removed, the defendant will be enabled to make a disposition of the property, so that the plaintiff may be unable to obtain payment of any alimony which may be ordered to be paid to her.

MR. HOLMESTED granted the order asked.

C. L. Cham.]

McGUNNIGHAL v. G. T. R. W. Co.—McNABB v. INGLIS.

[C. L. Cham.]

COMMON LAW CHAMBERS.

McGUNNIGHAL v. GRAND TRUNK R. W. Co.

A. J. Act, 1873, cap. 8, sec. 18—Trial without jury—Action for negligence.

Order made to send a case for trial by a jury under 36 Vict. cap. 8, sec. 18, in an action against a railway company for negligence in killing horses by a train at a road crossing.

[September 12, 1874.—*Mr. Dalton.*]

This was an action against the Grand Trunk R. W. Co., for a span of horses killed by a train on a crossing. On the first trial the jury disagreed; on the second, a verdict was given for the plaintiff, which verdict was set aside by the Court as contrary to law and evidence, and the cause had been three times since then made a *remanet*.

The evidence was conflicting as to the existence of contributory negligence on the part of the plaintiff. Under these circumstances, the defendant obtained a summons under sec. 18 of 36 Vict. cap. 8, (Administration of Justice Act, 1873,) to have the cause tried by a Judge without a jury.

English shewed cause. The Act did not intend to affect such a case as the present, which, being a case of the conflict of evidence, is a very proper case to be tried by a jury. In England, the Court of Chancery has, under a recent statute, power to send issues to be tried before a jury; and, upon applications to try the issues without a jury, the decisions go to show that the Judges will not do so where there is any conflict of evidence.

J. B. Read, contra. It was for just such cases as this that the section was enacted, it being felt that in such cases a jury is hardly apt to give a fair verdict to the corporation. By sec. 16, equitable issues *must* be tried without a jury; and, although there is no equitable plea in this case, the question to be tried is a matter of equity, a loss having undoubtedly

occurred. The question is merely as to who must suffer thereby, the company or the owner.

MR. DALTON.—I think that this case comes within the evil intended to be remedied by the statute, and that it is a case which is very proper to be sent for trial to a Judge, and I must, therefore, make the order.

Order accordingly.

MCNABB v. INGLIS.

Irregularity—Setting aside declaration for—Laches.

Held, that a party applying to set aside a declaration for irregularity on the last day for pleading, has lost his right by his own laches.

[September 12, 1874.—*Mr. Dalton.*]

In this case the declaration served did not contain the date of the issuing of the writ. This date was in the copy filed. On the last day for pleading, a summons was taken out to set aside the declaration on the ground of irregularity in not containing this date.

Mr. Hall (T. Ferguson) shewed cause. As this is a mere irregularity, it must be taken advantage of within four days (1 Ch. Arch. 237), or else it will be waived. In addition, it is not necessary that the date of the writ should be stated in the commencement of the declaration: 1 Ch. Arch. 229; *Cooper v. Watson*, 5 Prac. R. 30. Although there are forms of declarations given in the statute, still these are not imperative, and it has been provided that no deviation from the forms shall be considered irregular.

Fleming, contra.

MR. DALTON.—I think the defendant has,

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IN RE A. B. AN ATTORNEY—MORELL V. MORRISON.

[C L. Cham.

through his own laches, forfeited any right to come now to set aside the declaration ; and, upon the authority of *Anderson v. Culver*, 3 Prac. R. 306, I think I must discharge the summons.

Summons discharged.

IN RE A. B., AN ATTORNEY, &c.

Security for costs of taxation of attorney's bill—Client out of jurisdiction—Special circumstances.

Held, that the fact of a client, who has applied to have an attorney's bill taxed, is out of the jurisdiction, is not a sufficient ground for an order for security for costs, but, upon special circumstances being shewn, it may be.

[September 19, 1874.—*Mr. Dalton.*]

In this case, under an order of a Judge, A. B., an attorney, delivered his bill of costs to C. D., who resided at Chicago. C. D. then took out a summons to tax the bill, which was made absolute. A. B. then obtained a summons to stay proceedings on the taxation until security for costs should be given.

Akers shewed cause. This is an unprecedented application, and is made merely for vexatious delay. The Attorney's Act expressly prevents any such application as this. The amount also would be so small, that it would not be worth the while of the Court to interfere.

G. L. Tizard, contra. The principle of granting security for costs, viz.: that in the event of the defendant, or the person brought before the Court, succeeding, he would be unable to obtain his costs, is the same in this as in other applications, and there is also express authority for such an order : *Re Pasmore*, 1 Beaven 94. The mere fact of the person applying to the Court not being nominally a plaintiff is immaterial : *Drever v. Maudesly*, 5 Russell, 11; *Selby v. Crutchley*, 4 Moore, 280; *Benazech v. Bessett*, 1 C. B. 313. As to the smallness of the amount, that is no objection, as the opposite party can pay the amount fixed upon into Court.

MR. DALTON.—I do not think that I can make the order asked for, as, in my opinion, the client making such an application is really in the position of a defendant, as he is being sued,

or about to be sued, for the bill ; and merely comes here to find out the correct amount.

Leave was then asked, on behalf of the attorney, to file an additional affidavit, showing that the ground on which the judgment proceeded did not exist in this cause. Leave being accordingly granted, an affidavit was filed stating that the client had absconded from the Province, and that his estate here was in compulsory insolvency ; that the attorney had not sued, nor threatened to sue, for the amount of the bill, nor did he expect that the same would be paid after the taxation, and that in his belief the application to tax the costs was made to annoy him.

MR. DALTON.—It appearing that the attorney is being brought unwillingly before the Court, and is in the position of a defendant, I think the ordinary rule must apply, and I must grant the order for security for the costs of the taxation, which security I fix at fifty dollars.

Order accordingly.

MORELL V. MORRISON.

Administration of Justice Act, 1873—Examination of party residing abroad.

Held, that an order may be granted for the examination of a party under 36 Vict. sec. 24, cap. 8, although such party resides beyond the jurisdiction of the Court.

[October 15, 1874.—*Mr. Dalton.*]

A. Cassels applied for an order to examine the plaintiff under the Administration of Justice Act, 1873. It appeared that the party sought to be examined resided in England.

MR. DALTON.—Although this is the first application to examine a party out of the jurisdiction, I think the words of the statute are quite wide enough to include such a proceeding, and I will make the order.

Order accordingly.

C. L. Cham.] MURRAY v. GREAT WESERN R. W. Co.—MCLENNEN v. LEWES. [C. L. Cham.

CASCANETTE v. CHARTRAND.

Administration of Justice Act, 1873—Equitable pleadings in ejectment—How far authorized.

Held, that there is no authority under 36 Vict. cap. 8, secs. 4, 7, for carrying the pleadings in ejectment further than replication.

[October 16, 1874.—*Mr. Dalton.*]

Mr. Scott (Robinson & O'Brien) obtained a summons to strike out an equitable replication to an equitable defence in ejectment.

D. B. Read, Q. C., shewed cause.

Upon the argument it was decided that part of the replication should be struck out, and leave granted to the defendant upon terms to rejoin and demur to the rest.

Upon the application next day for the order, the matter having stood over, it was objected that the statute did not provide for the pleadings in ejectment being carried further than replication, and that therefore a Judge had no power to grant leave to rejoin and demur.

MR. DALTON.—Upon this objection I think I must refuse the order. The statute does not seem to have intended that the pleadings allowed should be carried on to issue as in an ordinary suit, but that there should be no pleadings after replication.

Summons discharged.

MURRAY v. GREAT WESTERN RAILWAY Co.

Service of papers at residence of attorney—Grown-up servant.

Held, that service upon a servant girl at the private residence of an attorney is good, and that the service counts from the time the papers are left, and not from the time they come into possession of the attorney.

[October 20, 1874.—*Mr. Dalton.*]

Upon the last day for service of notice of trial the issue book and notice of trial were left at the attorney's residence with a servant girl after office hours, but before seven o'clock. The attorney being away, did not receive the papers until the following morning.

A summons was taken out to set aside the notice of trial as served too late.

Mr. Kew (Read & Keefer) shewed cause. The service being upon a grown up person at the residence of the attorney, is perfectly good, and must count from the date of the service: *Burdett v. Lewis*, 7 C. B. N. S. 791; *Taylor v. Whitworth*, 9 M. & W. 478; *Alanson v. Walker*, 3 D. P. C. 258; *Warren v. Smith*, 2 D. P. C. 216.

J. B. Read, contra. The service is good, but must only count from the time the paper came into the possession of the attorney, and that was too late: *McCallum v. The Provincial Ins. Co.* 6 Prac. R. 101. If it had been upon a member of the family, it would be sufficient, but a servant girl is not within this rule.

MR. DALTON.—I think the service is perfectly good; and I must, therefore, discharge the summons.

Summons discharged.

MCLENNEN v. LEWES.

Term's notice.

The necessity for a term's notice, arises after the lapse of one year, not four terms, from last proceeding.

[October 20, 1874.—*Mr. Dalton.*]

In this case the last proceeding previous to the service of a notice of trial took place a year, wanting a day, from that date. Four terms had, however, passed between the two proceedings.

A summons was taken out to set aside the notice of trial, as no notice to proceed had been given, and four terms had elapsed.

J. H. Macdonald shewed cause.

J. B. Read, contra, cited *Reid v. Drake*, 3 U. C. L. J., 293; *Milbourne v. Nixon*, 2 T. R. 40; *Chitty's Arch.*, 8th ed., 132; *Bain v. Bolton*, 1 Prac. R. 14; *Lord v. Hilliard*, 9 B. & C. 621.

MR. DALTON.—I think the case of *Tyre v. Wilkes*, 2 Prac. R. 270, virtually decides the question. I must discharge the summons with costs.

Summons discharged.

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NERLICH V. CLIFFORD.

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NERLICH V. CLIFFORD.

Prohibition to Division Court—When application may be made—Costs.

Held, that a prohibition may go in the first instance without the question of jurisdiction being raised by any proceeding in the Court below; but when a party applies without having raised the question in the Court below, he will not be allowed costs.

[October 30, 1874.—*Richards, C. J.*]

In this case a summons was obtained by the defendant for a prohibition to the Judge of the First Division Court of the County of York to restrain him from further proceeding on a plaint in that Court. The summons was taken out before any notice of defence or other proceeding had been taken by the defendant in the Court below.

Mr. Doyle (O'Donohoe & Meek) shewed cause.

Osler, contra.

RICHARDS, C. J.—The only question discussed before me was, whether the defendant should not have raised the question of jurisdiction before the Judge of the Division Court, before applying for the prohibition. The whole law on the subject of prohibition seems exhausted in the opinion of the Judges delivered by the late Mr. Justice Willes, in the case of the *Mayor of London v. Cox*, in the House of Lords, reported in L. R. 2 E. & I. Ap., 252. The first point of interest there was, whether the writ was in the discretion of the Court. Willes, J., shews how the erroneous opinion arose as to its being a discretionary matter to grant the writ, from the fact that the proceeding was based upon a mere suggestion before plea pleaded, and, on this suggestion, the Court might decline to issue the writ; but since the alteration of the practice in prohibition, under the Imperial Act of 1 Wm. 4, cap. 21, similar to our Act of Canada, 28 Vict. cap. 18, when the application is on affidavit, the Courts consider themselves bound to issue the writ when the Court is duly informed that an Inferior Court has committed such a fault as to found the authority of the Superior Court to prohibit, though there may be a possibility of correcting it by appeal (see pp. 278-9.) The rule is, that when the want of jurisdiction is apparent on the proceedings, prohibition goes at any time after service of the process, and even before articles, because it is much better for the party to apply for prohibition in the first stage, than after the expense is incurred. At p. 282-3

the effect of omitting to apply when the defect is patent, and when it is suggested, is considered. Then the opinion proceeds, “Indeed it seems not too much to assert that the question at what time a prohibition ought to issue is one of practice only, and that there is not necessarily any difference in the form of the writ of prohibition itself between the case of want of jurisdiction apparent on the proceedings in the Court below, and want of jurisdiction made known to the Court above by surmise of collateral matter * * If the application be resisted as unnecessary or vexatious or premature the practice which has prevailed of deciding such matters at once upon the motion seems unquestionably the more convenient one. No case has been cited or found in which it was raised or decided upon the record. And there is abundant authority to shew that even upon motion it is not an objection that ought to prevail, and that the party proceeded against in the Inferior Court *may at his option, either plead there or apply for prohibition.*” The same law is there laid down (p. 285) as in Comyn's Digest, “Courts,” p. 15, where, after stating that the defendant may plead to the jurisdiction of the Inferior Courts, it is said: “So, upon an *affidavit* of the fact, he may have a prohibition without pleading to the jurisdiction.” At p. 289 reference is made to cases in which prohibition was refused because there was only a suggestion, and no affidavit, and the observation of Mr. Justice Aston is referred to, that “even before sentence it would not be *decent* to grant a prohibition when no such plea had been tendered (to the Court below), much less after sentence.” Mr. Justice Hewitt, afterwards Lord Lifford, said: “It is reasonable to move, before sentence, for a prohibition upon affidavit of the truth of the suggestion, when the fact suggested is not pleaded.” In 4 Burr, 2040, the Court of Queen's Bench, after examining the cases, laid down the general rule that an objection to the jurisdiction over the subject matter “must either be pleaded below, or verified by affidavit;” and this rule was recognized by Lord Mansfield, in *Caton v. Burton*, 2 Cowp. 330, where he said: “The reason of those cases is decisive, and the party shall not stop the proceedings of a court of justice upon a mere suggestion, without an affidavit.” The judgment then proceeds: “Upon this rule, so far as we can ascertain, rested the practice up to the passing of 1 Wm. 4, cap. 21; since which there must always be an affidavit” (p. 290). As to the practice since the statute 1 Wm. 4, cap. 21, it has been uniform to the effect, that prohibition *may go in the first instance without*

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the question of jurisdiction being raised by any proceeding in the Court below, and even after a plea therein, giving the go-by to that question. It was so decided by Mr. Justice Wightman in the case of a prohibition to the County Court in *Sewell v. Jones*, 1 L. M. & P. 525, and such has been the constant practice in like cases.

This opinion of the Judges seems conclusive on the right of a defendant to apply for a prohibition without raising the question of jurisdiction in the Court below; and as this is the only question raised before me, the prohibition will go.

In Gray on Costs, p. 446, there is a chapter on costs in prohibition, in which the effect of the 1 Wm. IV., cap. 21, similar to our 28 Vict., cap. 18, is discussed, and the conclusion arrived at is, where the rule nisi for prohibition is made absolute without any declaration in prohibition, the plaintiff is not entitled to costs. And even where a declaration in prohibition was ordered, and the defendant submitted before the plaintiff in prohibition had declared, the defendant was not liable to pay costs before the passing of 1 Wm. IV., cap. 21. The withholding of costs may have the effect of inducing parties to raise the question of jurisdiction in the Court below: and where the case is plain, it may be disposed of at little expense to the parties. In this particular case there seems no reason why the question should not have been raised in the Court below.

The order will therefore go for a prohibition, but there will be no costs to either party.

Prohibition ordered.

IN RE REVISION OF THE VOTERS' LISTS OF THE TOWNSHIP OF GODERICH FOR THE YEAR 1874.

Revision of voters' lists—37 Vict. cap. 4, sec. 3.

The list of voters required to be posted to various persons under 37 Vict. cap. 4, was prepared and certified by the clerk of the municipality, ready for transmission on a certain day, but he died before that day came, and they were in fact transmitted by his successor without any alteration in the certificate. They were regular in every respect, with this exception:

He'd, that as sec. 3 of 37 Vict. cap. 4, was only directory, and as the object of the statute was fulfilled to all intents and purposes, the list was sufficient to give jurisdiction to the County Judge to revise it.

[November 26, 1874—*Morrison, J.*]

Osler obtained a summons for a writ of prohibition to restrain the Judge of the County Court of the County of Huron from further proceeding with the revision of the voters' list for the township of Goderich, on the ground that the Judge had no jurisdiction to proceed with such revision, the list not having been signed by the township Clerk, or put up in his office, or mailed by him, or published, as by law required: that one Stokes, the former Clerk of the township, was dead at the time the lists as revised purported to be signed by him, and that the said list was not the list of voters the Judge had jurisdiction to deal with. The summons was granted upon affidavits and papers referred to in the judgment.

Hodgins, Q. C., for the Judge of the County Court and others interested.

Osler, contra.

The facts fully appear in the judgment of

MORRISON, J.—By sec. 7 of 32 Vict., cap. 21, under the head of "Registration of Voters," it is provided that the Clerk of each municipality shall, after the final revision of the assessment rolls in any year, make a correct alphabetical list of all persons entitled to vote therein, &c.; and that he shall certify by oath or affirmation to the correctness of any list so by him made out; and shall keep such certified lists among the records of the municipality; and all such lists shall be completed, &c., on or before the 15th August in each year.

By the 37 Vict., cap. 4, sec. 3, it is provided that immediately after the Clerk has made the

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alphabetical list under the 32 Vict., within thirty days after the final revision of the assessment roll, the Clerk shall cause two hundred copies of the list to be printed, and cause one of such lists to be posted up, and to be kept posted up, in some conspicuous place in his office, and shall forthwith also deliver, or transmit by registered letter, two of such copies to the persons mentioned in the section: members of the municipal Council, every teacher of a public school in the municipality, every post master, the Sheriff, Clerk of the Peace, and other officers; and ten of such copies to the members of the Legislatures, &c.; and by the 3rd sub-sec., upon each of the copies so sent to each person shall be a printed or written certificate, over the name of the Clerk, stating that such list is a correct list, &c., and the date upon which a copy of such list was first posted in the Clerk's office, and calling upon all electors to examine the list, and if any omissions or other errors are perceived therein, to take immediate proceedings to have the error corrected according to law; and by the 4th sub-sec., the Sheriff, the Clerk of the Peace, any public teacher and any post master are required to post up these copies at their respective offices, &c.; and by the 4th sec., the Clerk is required to publish the list in a newspaper in or near to the municipality.

By the 5th sec. it is enacted that the list of voters shall be subject to revision by the County Judge at the instance of any voter, on the ground of voters being omitted from the list, or wrongly stated therein, &c.; and the 6th, 7th, and 8th sections make provisions for the proceedings to be had on such revision.

It appears that at the time of the final revision and correction of the assessment roll herein, one Stokes was the clerk of the municipality of Goderich; that as such Clerk he made alphabetical lists for the five divisions of the township, &c.; that with a view of carrying out the provisions of the Act of 1874, 37 Vict., he had the necessary copies printed in anticipation of his delivering and transmission of the proper number of the printed lists to the various persons mentioned in the statute, with the proper certificate printed over his name, dating the same the 6th August, no doubt in anticipation, as I have stated, that he would on that day post up a copy in his office, and immediately after transmit the copies to the various parties under the statute. On the 1st of August Mr. Stokes, the Clerk, died. On the 3rd August the municipal Council met and appointed the present

Clerk *pro tem.*, (as stated in the resolutions appointing him), under the 183rd sec. of the Municipal Act; and subsequently on the 10th August he was appointed permanently the Clerk. The new Clerk, on the 3rd August, finding in the Clerk's office, prepared and printed, with the certificate and notice attached, the voters' lists ready for delivery and transmission, at once posted up a copy in his own office, and between the 3rd and 8th August transmitted the proper number of copies to the various persons mentioned in the statute. I may here remark that if he had struck out the deceased Clerk's name and inserted his own, the lists would have been strictly according to the letter of the statute. On the 9th November last, notices of complaints against names in such list were transmitted to the Clerk under the statute. Among others, there was a complaint made by Collins, the applicant herein, complaining of the names of several persons appearing on the list of voters who, as alleged, were not entitled to vote. On this complaint being called, it was objected that the learned Judge could not proceed to the revision of the list, having no jurisdiction in the matter, owing to the circumstances above stated, appearing on the examination of the present Clerk. It was not suggested on the argument that the list in question was not the voters' list properly made and verified as required by the statute of 32 Vict., chap. 21; nor was it contended that there was anything in the printed list or certificate calculated to mislead, or that it did mislead, any voter or other person interested, or that it did not furnish all the information required by the statute. The objection was strictly a formal and technical one. The only object of these printed lists, and the posting and delivering of copies to the various parties, was to afford an opportunity to those interested of seeing the list, and of making and giving notice of objections and claims.

The jurisdiction of the Judge is given by the 5th section of 37 Vict., which enacts that the list of voters, *i. e.* the list required by the 7th section of the Election Act of 1868, shall be subject to the revision of the County Judge at the instance of any voter, &c. The jurisdiction is not conditional. There are no negative words used. It is true that the Clerk is required to take the same steps directed to be taken by him under the 3rd section for the purpose of giving publicity to the lists, but the statute does not say, if done otherwise than directed, no proceedings can be had for reviewing the list, or that the Judge would have no jurisdiction in the

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matter. We cannot suppose that the Legislature intended, that if the Clerk omitted any of those things which he is directed to do, such as making out the list alphabetically, or omitting to post up a copy in his office, or transmitting a less number of copies to some of the parties than the Act requires; or, again, that if the Sheriff or Clerk of the Peace or other parties put their copies in the fire, instead of posting them up in their offices, &c., that the Judge could not proceed to revise the list on complaint being made under the statute. All the proceedings in the act of 1874, relative to the Clerk, are, in my opinion, merely directory, with a view to notifying the electors of the state of the lists, and where, as in this case, such notification was effectually given, and the plain object and general intention of the statute has been in fact complied with, it would be the duty of the Judge to proceed with the revising.

It was argued that the certificate to the lists should be signed by the Clerk. I see nothing in the statute to that effect. What the statute says is, that upon each of the copies shall be a printed or written certificate over the name of the Clerk. The object of having the Clerk's name appear, no doubt, was to authenticate the list as coming from the Clerk's office. Mr.

Stokes was the Clerk who actually made out and had the lists printed and ready for delivery, &c. The fact that he died at the time stated could not have misled any voter as to the authenticity of the list, as it appeared to issue, and came from the Clerk's office. It seems to me that it would be a very idle and unnecessary proceeding to reprint the lists at considerable expense, and have these resent to the same officers and parties, and delay for a long period the revision of the lists upon so formal and technical an objection.

On the whole, as I am of opinion that the various provisions of the 3rd section of the Act of 1874, relating to the duty of the Clerk, &c., are merely directory, and that the object of these provisions has been to all intents and purposes fulfilled, the learned Judge had jurisdiction to proceed with the revision of the voter's list.

The summons will be discharged, but there will be no costs.

Summons discharged.

MASTER'S OFFICE—QUEEN'S BENCH.

MERCHANTS BANK v. ROSS.

Law Reform Act 1868, sec. 17—Chamber application—New trial on payment of costs.

Held, that the costs of a chamber application to stay proceedings until term in a Superior Court case tried at the County Court under the Law Reform Act 1868, are taxable under a rule for a new trial upon payment of costs, the County Court Judge having refused to stay the proceedings.

[Master's Office, Q. B.—December 9, 1874.]

This case was tried at the County Court in pursuance of 32 Vict., cap. 6, sec. 17, and a verdict

given for the plaintiffs. The defendants wishing to move for a new trial applied under subsec. 4 to the County Court Judge to stay proceedings until term, which he refused to do. The defendant then applied in Chambers, and obtained an order staying proceedings. A rule *nisi* for a new trial was obtained, and was made absolute upon payment of costs.

The Master held that the costs of the Chamber application were costs which were properly taxable under the rule.

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CHANCERY CHAMBERS.

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Vendor and purchaser—Waiver of right to object to title.

Where, after a sale under decree of the Court, an abstract had not been demanded, and no steps had been taken by the purchaser or his representatives for twenty-three months after the confirmation of the report, a reference as to title was refused, and the purchaser held to have accepted the title.

[January 14, 1875.—Referee.]

This was an application made by the plaintiff for resale.

The sale took place in this cause on the 11th October, 1872, when the deceased defendant, Alexander Sirr, became the purchaser for the sum of \$1850, payable as follows: ten per cent. on the day of sale, and the balance in one month thereafter, without interest. The report on sale was not made until 13th January, 1873. On the 18th March, 1873, the purchaser died, without having completed his purchase. The representatives of the deceased purchaser had taken no steps to carry out the purchase; and the present application was made against them to compel them to pay into Court the amount of the purchase money, or in default that the property might be resold, and that the deficiency on such resale, if any, might be ordered to be paid out of the estate of the deceased purchaser.

W. A. Foster for the plaintiff.

J. C. Hamilton, for the administrator of the deceased purchaser and for the guardian for the infant heirs, was willing to consent to an order for a resale, but objected to any order for payment of the deficiency, and he claimed to be entitled to a reference as to title, in the event of an order of that kind being insisted on.

MR. HOLMESTED.—It was urged that the reason that the sale in this suit was not carried out in

the lifetime of the purchaser was because of the inability of the vendors to make a good title. The affidavit of Mr. Dixon filed on the 27th November, 1873, however, I think shews that such was not the case, and that the true reason was the inability of the purchaser to raise the purchase money. The General Order 390 does not in express terms limit the time within which a purchaser must demand an abstract of title (*a*). I had some doubt whether until the purchaser had demanded an abstract and it had been delivered to him, the time would begin to run for objecting to the title, but on consideration I have come to the conclusion that a purchaser cannot, by neglecting to demand an abstract, put himself in a better position than he would be in, had he acted diligently. Here there is not the slightest evidence that the purchaser in his lifetime, or his representatives since his death, have ever demanded an abstract or taken any steps whatever to compel the vendors to shew title. After the great delay which has taken place, the purchaser must be taken to have accepted the title, and I think that I ought not to order a reference as to title as requested. On this point, however, I confess I am not free from doubt, and I should be glad if my decision should be appealed from in order that the practice may be settled. The order must direct the payment of the purchase money within a fortnight, or in default, a resale, and the estate of the deceased purchaser must pay the deficiency (if any), including the costs of this application.

See Danl. Pr. 5th ed. pp. 1179. Dart V. & P. 4th ed. 1112.

Order granted.

(*a*) In England the statute 15 & 16 Vict. §6, sec. 56 provides that a time shall be limited in the conditions of sale for the delivery of the abstract, and such a provision might be usefully introduced here. In England the time usually limited is four or seven days after the sale has become confirmed: Daniel Prac. 5th Ed, p. 1164.—REF.

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Vendor and Purchaser—Sale under decree of Court—Interest—Objections to abstract—Con. Orders 390–393—Incumbrance—Taxes—Sever rates—Delivery of possession.

Where there is no stipulation as to interest, the general rule of the Court is that the purchaser, when he completes his contract after the time mentioned in the particulars of sale, shall be considered as in possession from that time, and shall from thence pay interest on his purchase money, taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then the Court gives the vendor no interest, but leaves him in possession of the interim rents and profits.

A sale under a decree took place on the 25th July. The time fixed for completion of the contract was 25th August (one month after the sale); but under the rule above stated the purchaser was relieved from payment of interest on his purchase money up to 7th October.

The vendors contended that they were not liable to pay taxes which were not actually imposed on the 25th July. Held, that under 32 Vict., c. 36, (O.) secs. 18 and 107, no matter at what time in the year a rate is imposed, the taxes relate back and are deemed to accrue and to be due for the purpose of forming a lien on the land from the 1st January. The vendors were, therefore, required to pay the proportion of the year's taxes due up to the 7th October, the day from which the purchaser was to be deemed to be in possession.

A sewer rate imposed under 36 Vict., c. 48, (O.,) sec. 384, sub-sec. 52, forms no charge on land and is, therefore, not an incumbrance which a vendor is bound to remove.

Sensible, that a rate imposed under 36 Vict., c. 48, (O.,) sec. 464, does form a charge upon land.

A purchaser is not entitled to require a vendor to pay the amount necessary to commute a sewer rate.

A purchaser, on receipt of the abstract, is, under Consol. Orders 390–3, bound within seven days to take all the objections he intends to take to the sufficiency of the abstract. These being removed, it is not open to the purchaser to take any further objections to the sufficiency of the abstract—he can only require the vendors to verify the title shewn on the abstract.

Under the standing conditions of sale a purchaser is not entitled to possession until he has paid the full amount of his purchase money into Court.

[January 14, 1875.—Referee.]

This was a motion by a purchaser, 1. To be allowed to deduct from his purchase money the taxes due on the lands purchased by him for the year 1874; 2. To be relieved from the payment of interest on his purchase money from the day of sale to the date of this application; 3. To compel the plaintiff (by revivor) to take pro-

ceedings to give him possession of the property within ten days, and in default that purchaser may be allowed to deduct all costs, charges, and expenses from his purchase money which he may be put to in consequence of plaintiffs' default; and, 4. For costs of the application.

J. C. Hamilton, for purchaser.

E. Crombie, for vendor.

MR. HOLMESTED.—The sale took place on the 25th July last, when the present applicant became the purchaser of the lands in question for the sum of \$5,570, ten per cent. payable at the time of sale, and the balance, without interest, in one month thereafter, when according to the standing conditions the purchaser was to be entitled to a conveyance, and to be let into possession. The report on sale was made the 1st September, and was confirmed the 17th September.

The purchaser's solicitor made a demand for an abstract (the date of this demand does not appear) and an abstract was delivered on the 12th September, 1874. This abstract the purchaser's solicitor contends did not shew a good title, and was therefore not a perfect abstract; and it is in consequence of this imperfection in the abstract and the delay thereby occasioned in the investigation of the title that the purchaser now claims to be relieved from the payment of interest on his purchase money. On the 15th September objections and requisitions were served. These objections it is true were not confined to the sufficiency of the abstract itself, but besides objections of that kind there were also requisitions included which appear to relate more properly to the verification of the abstract, if indeed they are matters concerning which the vendors were bound to give any information at all, which I doubt: (See *Re Charles*, 4 Chy. Ch. 16; *Thompson v. Millikin*, 9 Gr. 359). The objections to the sufficiency of the abstract were these:—

1. The grant from the crown was not sufficiently abstracted.
2. The due execution of the will of Hon. John McGill was not sufficiently stated.
3. Nothing appeared on the abstract to shew that the interest of George Bilton, a mortgagor, had been foreclosed or got in, or was bound by the decree.

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4. The proceedings in this suit under which the sale took place were not sufficiently shewn.

On the 7th October answers were delivered which I presume the purchaser's solicitor considered satisfactory, because in his subsequent requisition, made verbally on the 13th October, 1874, he made no objection to the sufficiency of the answers delivered to his requisitions of the 15th September, and it was then too late to make new objections to the sufficiency of the abstract. On the 18th December, however, after searching in the registry office the purchaser's solicitor discovered that one James Magrath had a registered mortgage on the property, which did not appear on the abstract, nor was it shewn how his interest as mortgagee was disposed of, and he therefore delivered a requisition in the words, "It appears on search in city registry that one James Magrath had a mortgage over part of the premises for W. W. Fox, dated 20th May, 1859. He is not a party to suit, nor does it appear that this interest is disposed of; Explain." This is in effect a further objection to the sufficiency of the abstract, and I think it was a proper one to take if it had been taken in time.

The plaintiffs in this suit are, as I understand, first mortgagees, and they are selling the mortgaged property under the decree. Now although as a general rule it is said a purchaser is not bound to go behind the decree, yet that, after all, would seem to mean that he is not bound to enquire into the regularity of the prior proceedings : see *Dart V. & P.* 4th ed., p. 1108, note (i). But if he have notice of the claims of persons who ought to have been parties to the suit, but are not, the decree will be no protection to him against such claims : *Dart V. & P.* 1110. Here the Magrath mortgage being registered, there can be no doubt, I think, that the purchaser would be deemed, under the Registry Act, to have notice of it, and unless Magrath or his representatives were parties to the suit the decree would be no protection to the purchaser against it, and Magrath or his representatives would still have an equity of redemption. This being the case, I think the abstract as delivered was defective in omitting this mortgage. This objection, however, as I have said before, is an objection to the sufficiency of the abstract, and according to the General Order 390, it is an objection which should have been taken within seven days after the delivery of the abstract ; not having been taken within that time the purchaser is to be deemed to have accepted the abstract as sufficient, except as to those matters

which were covered by the objections of the 15th September, which objections were removed on the 7th October. After that date all that the purchaser could properly require the vendors to do was to verify the abstract delivered as supplemented by the answers delivered on the 7th October. I am unable to collect from the papers that the subsequent delay has arisen from the delay or inability of the vendors to complete this verification. On the contrary, I judge that it must rather have arisen from an attempt on their part to satisfy other requisitions delivered by the purchaser, which strictly speaking they were not bound to answer. But the delay thus occasioned I do not think can prejudice their claim to interest on the purchase money : see *Litchfield v. Brown*, 23 L. J. N. S. Chy 176.

Boyd, Master, in *McManus v. Little*, 3 Chy. Ch. 263, was at great pains to place the practice on this point on an intelligible basis, and I think he succeeded. According to his exposition of Orders 390-3 I gather that a purchaser on receipt of the abstract is bound within seven days to take all the objections he intends to take to the sufficiency of the abstract ; e.g., that documents are not sufficiently abstracted, or omitted altogether, or that the abstract delivered does not shew on its face a title in the vendors. These objections being removed, it is not then open to the purchaser to make any further objections to the sufficiency of the abstract itself. He can only then require the vendors to verify the title as shewn on the abstract and supplemental abstract, if any, under Con. Order 394.

Now, the rule as to interest is thus stated by Sir John Leach, in *Esdaile v. Stephenson*, 1 Sim. & S. 123—"Where there is no stipulation as to interest, the general rule of the Court is that the purchaser, when he completes his contract after the time mentioned in the particulars of sale, shall be considered as in possession from that time, and shall from thence pay interest at four per cent., taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by vendor, there to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the Court, therefore, gives the vendor no interest, but leaves him in possession of the interim rents and profits." See, also, *Jones v. Mudd*, 4 Russ. 118 ; *Monk v. Husskisson* 4 Russ. 121 in note ; and *Coupe v. Bakewell*, 13 Beav. 421.

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In the present case the time fixed for completion of the contract was a month after the day of sale, *i. e.*, 25th August, on which day, according to the evidence, the purchaser was to pay into Court the balance of his purchase money, and to get his conveyance, and to be let into possession —a day, I may observe, when from the intervention of the long vacation, it was utterly impossible that the sale could, in the ordinary course of events, have been confirmed, which, I think, was objectionable, and any delay which arose in consequence is attributable to the vendors rather than the purchaser.

According to the general rule of the Court there can be no doubt the purchaser is bound to pay interest from the 25th August. I think, however, it is clearly made out that the delay which has taken place in completing the contract at all events up to the 7th October was occasioned by the vendors, and that, therefore, the purchaser should be relieved from the payment of the interest accrued up to that date, and on the other hand, the vendors will be entitled to retain the rents up to that date.

With regard to the taxes the vendors contend that they are not liable for any taxes which were not actually imposed at the time the sale took place. By the Assessment Act, 32 Vict. c. 36, sec. 18, it is provided that "the taxes or rates imposed or levied for any year shall be considered to have been imposed *and to be due* (a) on and from the first day of January of the then current year, and end with the 31st day of December thereof, unless otherwise expressly provided for by the enactment or by law, under which the same are directed to be levied." Section 107 of the Assessment Act provides that "the taxes accrued (b) on any land shall be a special lien on such land, &c."

I confess I feel great difficulty in understanding what the Legislature meant by the words "and to be due", in the 18th section, unless it be that they were introduced to meet the cases of *Ford v. Proudfoot*, 9 Gr. 478, and *Taylor v. Corbett*, 23 U. C. Q. B. 454. Taking the two sections together it appears to me that they warrant the conclusion that no matter at what

(a) In the C. S. U. C. c. 55, s. 16, under which *Ford v. Proudfoot*, 9 Grant 478, and *Taylor v. Corbett*, 23 U. C. Q. B. 454, were decided, the words "and to be due" are omitted.

(b) In C. S. U. C. c. 55, s. 107, the words were "accrued or to accrue."

time in the year the rate is actually imposed the "taxes are to relate back and to be deemed to accrue *and to be due* for the purpose of forming a lien on the land *dé die in diem*: See *Bell v. McLean*, 18 C. P. 416, per Wilson, J. See also Rawle on Covenants, p. 97, note 2, and *Hutchins v. Moody*, 30 Vermont 655, and other cases there cited. If this conclusion be correct then I think the vendors should pay the proportion of the year's taxes due up to 7th October.

In addition to the ordinary taxes the purchaser claims that there are also arrears of sewer rates due in respect of the land in question which he is entitled to have paid off by the vendors. The proper determination of this question appears to me to depend on the particular authority under which the rates in question were imposed, and on this point there is no evidence before me.

If these rates were imposed under the provisions of 36 Vict. c. 48, s. 464, or the preceding act 29 & 30 Vict. c. 51, s. 301, or C. S. U. C. c. 54, s. 299, I should be of opinion that the arrears of rates due and payable on the 7th October last are a charge upon the land, and ought to be paid by the vendors. But if such rates are merely rents for the use of the sewer imposed under C. S. U. C. c. 54, s. 297, ss. 20, or 29 & 30 Vict. c. 51, s. 296, ss. 55, or the present Municipal Act s. 384, ss. 52, then it appears to me I am bound by the decision of the Court of Queen's Bench, in *Moore v. Hynes*, 22 U. C. Q. B. 107, and *McCutcheon v. City of Toronto*, *Ib.* 613, and must hold that they form no charge upon the land itself, and are, therefore, not an incumbrance which the vendors are bound to remove. It was the purchaser's duty to make out a case for the payment of these arrears, and as he has failed to do so, I can make no order as to them.

The purchaser also claimed to be entitled to require the vendors to pay off the amount necessary to be paid in order to commute the rate, but I think no matter under what section the rate was imposed that this claim could not be sustained; the cases of *Moore v. Hynes*, and *McCutcheon v. City of Toronto*, are authorities against there being any such right.

With regard to the delivery of possession, I think the motion of the purchaser is premature. Under order 389, where he is entitled to be let into possession of the estate, he may, if posses-

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sion be wrongfully withheld from him, proceed at his own expense to obtain an order against the party in possession for the delivery thereof to him; or he may call upon the vendor to cause possession to be delivered to him. Under the conditions of sale in the present case the purchaser is not entitled to possession until he has paid the full amount of his purchase money into Court. This has not been done yet. The purchaser is, therefore, not in a position to require possession to be delivered; nor yet can he claim any damages for possession being withheld from him. This part of the application, therefore, must be refused. If on payment of his purchase money into Court possession be withheld, he can apply again, and if any delay then arise in giving him possession, that will form a fit subject for compensation: *Thomas v. Buxton*, L. R. 8 Eq. 120.

The order I now make, therefore, is (1) To dispense with the payment of the interest on the purchase money from 25th August to 7th October, and to declare the vendors to be entitled to the rents up to the latter date. (2) To authorize the purchaser to deduct from his purchase money a proportionate part of the taxes—excluding sewer rates—accrued in respect of the land in question up to 7th October last, and (3) To refuse the application, so far as it relates to sewer rates and the delivery of possession. As the costs have not been increased by the purchaser's claiming more than he is found entitled to, I think the costs of the purchaser should come out of the purchase money, and that the plaintiff's costs should be costs in the cause.

RE KELLY.

Lunatic—*Con. Stat. U. C. c. 12, secs. 31, 32 and 33.*

A person whom it was sought to have declared a lunatic was shewn to be in a state of mind described as “senile imbecility.”

Held, that he might properly be declared a lunatic under *Con. Stat. U. C. ch. 12, secs. 31, 32 and 33.*

[January 25, 1875.—*Chancellor.*]

J. C. Hamilton moved for an order declaring a person in the condition above described to be a lunatic.

It was questioned whether such a person was within the terms of *Con. Stat. U. C. c. 12*, secs. 31, 32, and 33. These sections were as follows:—

31. “In the case of lunatics, idiots, and persons of unsound mind, and their property and estates, the jurisdiction of the Court shall include that which in England is conferred upon the Lord Chancellor by a commission from the crown under the sign manual.”

32. “The word ‘lunatic’ is used in the subsequent sections of this Act as including an idiot or other person of unsound mind.”

33. “The Court may, on sufficient evidence, declare a person a lunatic without the delay or expense of issuing a commission to enquire into the alleged lunacy, except in cases of reasonable doubt.”

C. Moss appeared for S. Kelly one of the heirs at law of the lunatic.

SPRAGGE, C.—The subject of this petition is afflicted with what one of the medical witnesses designates, I have no doubt correctly, as “senile imbecility.”

The question that occurred to me was, whether a person in that mental condition could be declared a *lunatic* under the statute. A perusal of secs. 31, 32 and 33 of the Chancery Act (*Con. Stat. U. C. c. 12*) has removed any doubt that I entertained.

I have no doubt that the words used in the first and second of these sections comprehend all persons of unsound mind, *non compos mentis* being, as Lord Coke says, (*Co. Litt. 246 b.*) “the sure term.” He then goes on to define the several “sorts” of this infirmity, one being “he that by sickness, grief, or other accident, wholly loseth his memory and understanding;” and Lord Erskine, in commenting upon these definitions of Lord Coke, in *Ex parte Cranmer*, 12 Ves. 451 and 452, uses this language: “This is not a man who has sometimes understanding, and sometimes not: his understanding is defunct; he has survived the period that Providence has assigned to the stability of his mind.” This describes exactly the mental condition as disclosed upon affidavit, of the very aged man in relation to whom this petition is presented. It is a proper case for a declaration under the statute.

Order granted.

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RE CRONAN—FARRELL V. SCANLON.

Investment of funds in Court—Con. Stat. U. C. c. 12, s. 72.

Prima facie money in Court should be invested in the public funds; but the Court has, under Con. Stat. U. C., c. 12, sec. 72, a discretion to authorize investments on mortgages of real estate.

[January 25, 1875—*Chancellor*, on appeal from *Referee*.)

This suit was for partition or sale. A sale was ordered as most beneficial for the parties interested. It had taken place, and the share of an infant defendant, John Cronan, amounted to a little over \$1200. He was interested as a tenant in common in the land, and his interest was now represented by the above sum, and a sum of \$333, being his proportion of a sum secured by mortgage given for a portion of the purchase money. The defendant, Thomas Cronan, father of the infant, was entitled to a life estate, as tenant by the curtesy, in the land; and was consequently entitled for life to the annual proceeds of the purchase money.

The present application was made on behalf of the defendant, Thomas Cronan, for the investment of the above purchase money by way of loan to himself. He proposed that the money should be advanced to him on the security of a mortgage of certain real estate for his life. The security offered appeared from the affidavits to be of sufficient value.

D'Alton McCarthy, Q. C., for Thomas Cronan.

G. W. Badgerow for guardian of infant Cronan.

MR. HOLMESTED.—I have doubt whether the Court should sanction the proposed investment, or indeed any investment upon mortgage security in the absence of any special circumstances rendering that course necessary or advisable in the interest not only of the tenant for life, but also of the remainderman. By C. S. U. C. c. 12, sec. 72, it is provided that “all moneys that become subject to the control and distribution of the Court shall be paid in the name of the Accountant-General of the Court into the hands of such person or body corporate, or be vested in the name of the Accountant-General in the public funds of the province, or in such other securities as the Court from time to time directs, and all interest arising from the fund so deposited or vested shall be added to the principal sum, and be distributed therewith to the persons entitled to receive the same.” I may observe that this sec-

tion, which appears to be the only statutory power the Court possesses for the investment of moneys under its control seems somewhat loosely worded, and taken literally would appear only to contemplate the investment of funds in which the right to the income and the *corpus* are in the same person, and not to include a case like the present, where one person is entitled to the income for his life, and another person is entitled in remainder to the *corpus* of the fund. A long course of practice, however, has given a wider meaning to this section, and it is not for me now to narrow that construction. At the time this Act which is here consolidated was passed, I believe there were no public funds of this province, or at all events none that formed a convenient means of investment, and formerly it was the practice of the Court to sanction investments on mortgages of real estate more generally than perhaps it would have done but for that fact, and thus apparently going beyond the words of the statute, unless, indeed, I am mistaken in supposing that the general words, “or in such other securities,” are properly limited to securities *ejusdem generis* as those previously mentioned : Dwarris 621, (see, however, Imperial Act 23 & 24 Vict. c. 38, sec. 10, and General Order of 1st February, 1851, made in pursuance thereof. The terms of the General Order were, no doubt, governed by provision of the Imperial Act 22 & 23 Vict. c. 35, sec. 32.) The reasons which formerly prevailed for sanctioning investments on mortgages no longer exist, the public funds of the Dominion and this Province now afford a safe, an easy, and a reasonably profitable mode of investment, and there is no longer any absolute necessity for resorting to investments on mortgage security. It appears to me, therefore, that the reason which formerly induced the Court to depart from the strict wording of the Act having ceased, investments should now, as a general rule, only be sanctioned which come properly within its terms, and this more especially since the Legislature has by the 32 Vict. c. 37, sec. 1, expressly authorized trustees and executors to adopt that mode of investment (*i.e.*, in the public funds) : see *Kingsmill v. Miller*, 15 Gr. 171.

In England prior to the passing of 22 & 23 Vict. c. 35, sec. 32, trustees were not justified in lending upon mortgage when by the terms of the instrument creating the trust they were expressly directed to invest in the funds : *Pride v. Fooks*, 2 Beav. 430. The Imperial Statute to which I have just referred, however, now authorizes trustees to invest the trust fund on real securities, unless such mode of investment be

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expressly prohibited; there is no such Act, however, in force in this Province. By the Imperial Act 23 & 24 Vict. c. 38, sec. 10, and the General Order of 1st of February, 1861, made in pursuance thereof, investments of funds in Court in England may now be made upon such securities in England and Wales, but prior to the passing of this Act it is, I think, quite clear that the £3 per cents. were the only investment in which as a general rule funds in Court could be invested: see *Norbury v. Norbury*, 4 Madd. 191, and other cases cited in Lewin on Trusts, 6th ed. p. 276, note (e); *Holmes v. Moore*, 2 Moll. 328, and even since the passing of the statute there is an evident reluctance on the part of the English Courts to depart from that rule, especially if any detriment can possibly arise to those entitled in remainder (see *Cockburn v. Peel*, 4 L. T. N. S. 570), and notwithstanding the statute, investments in real securities are only sanctioned where special circumstances are made out which justify that course: *Peillon v. Brooking*, 4 L. T. N. S. 731.

Prior to the Imperial Statute 22 & 23 Vict. c. 35, I find the Court of Chancery in England refused to sanction an investment by trustees on mortgage securities although they were expressly empowered by the trust deed to invest in that manner: *Ex parte Franklyn*, 1 DeG. & S. 528; *Barry v. Marriot*, 2 DeG. & Sm. 491.

In the present case no special circumstances are made out to warrant the proposed investment. The mere fact that it would benefit the tenant for life is not sufficient. Besides, the investment of the money with the tenant for life, for the term of his life, I conceive, would of itself be objectionable, for the simple reason that, by the terms of the loan, the repayment would be postponed until after the death of the tenant for life; this would necessarily entail delay in realizing the security, which might be a serious prejudice to the remainderman, and one to which the Court would not unnecessarily subject him.

A similar application is made on behalf of the defendant, Edward Conway. The security offered in this case is a property the chief value of which consists in the tavern erected on it, a property liable to depreciation, and not a desirable nor, I think, a proper investment in any case for trust funds, unless it could be shewn that the land itself, without reference to its advantages as a tavern stand, is an ample security.

I must, however, refuse both applications on the broad ground that investments of funds in

Court on mortgage securities should not now be authorized, except under special circumstances.

The guardians of the infants having concurred in the applications, I do not think there should be any costs.

The defendant, Thomas Cronan, appealed.

January 25th, 1875.

D'Alton McCarthy, Q. C., for the appeal.

W. G. P. Cassels, contra.

SPRAGGE, C.—It was the practice of the Court for a number of years to approve of the investment of money in which suitors were interested upon the security of real estate. The statute of 1837 directed investments to be made in the public funds of the Province, or in such other securities as the Vice Chancellor of the Court should direct, and the same direction, with a change in the language which is not material, is contained in the Consolidated Chancery Act.

Whether investments in real estate were ever prescribed by General Order, as seems to have been contemplated by the statute, I am unable to say; but an Order would, I apprehend, be presumed, if necessary, from the practice of so many years: or it may be that a direction for such investment was contained in decrees and orders for the investment of moneys. But however that may be, it was the practice of many years so to invest. And I do not think that anything has occurred to make an investment in real estate an improper exercise of the discretion of the Court at the present time.

The primary object of 32 Vict. c. 37 was to protect trustees investing in public securities, and possibly a secondary purpose may have been to enhance the value of such securities in the market. The statute dealt with investments by individuals, not by the Court, leaving investments by the Court as before, and thus leaving it in the discretion of the Court, as it had always been, to invest "in such other securities," i.e., in securities other than the public funds, as the Court might direct.

It needed no legislation to authorize the Court so to invest. And I cannot but think that it would be retrogression rather than progress to confine ourselves here in practice to investments in public securities, while in England the modes

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of investments are by statute extended to fresh modes and securities; and among them to securities upon real estate.

Prima facie I think that moneys in Court should be invested in the public funds, but I think it would be mischievous to lay down as an inflexible rule that they *must* be so invested. A considerably larger income may generally be obtained from investments upon real estate than from investments in the public funds,—the difference is probably somewhere about two per cent. The principal is, more frequently than otherwise, of moderate amount, and the difference in income between the two modes of investment may make all the difference between straitened circumstances and comparative comfort, and in the case of children, between good and inferior education; and there is no danger of the Court or its officers being tempted by the offer of high interest to invest in unsafe securities.

The case of a tenant for life seems to stand upon a more favourable footing than other cases. *The Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379; *Re Langford*, 2 J. & H. 458; *Peillon v. Brooking*, 4 L. T. N. S. 731, and *Bishop v. Bishop*, 9 W. R. 549, are instances of this, and indirectly the infant may be benefited where, as in this case, he is the child of the tenant for life, by the father's means being improved, and his ability for the maintenance and education of the infant increased.

I have no doubt that the Court has a discretion to invest in real estate; and I think it would have been a proper exercise of discretion, so to invest in this case. The money should, however, as pointed out by the Referee, be made payable at a day certain, and application may be made at or shortly before the expiry of the time by the father for an extension of the time if he should desire further time for payment.

The costs attending this application must be paid by the tenant for life.

O'CONNOR V. WOODWARD.

Sale—Irregular adjournment.

A sale under the decree of the Court cannot be adjourned by the vendor's solicitor without the authority of the Court.

Upon a sale without reserve, it is not open to the vendor to refuse a bid, however small.

An irregular sale acquiesced in by the plaintiff and one of the defendants who appeared in the suit, was held not to bind the other defendant against whom the bill was taken *pro confesso*.

Semible, that if the plaintiff and the defendant who appeared were the only parties having concurred in the irregular proceedings it would not be open to them to dispute the validity of those proceedings.

[November 17th, 1874, and February 17th, 1875—*Referee.*]

By the decree made in this cause, it was declared that the plaintiff was entitled to a lien on the land in question for her support and maintenance, and that the defendant, Cholmondeley Woodward, was entitled to a lien as mortgagee subject to the plaintiff's claim; and it was referred to the Master to take an account of the arrears of maintenance due to the plaintiff; and also an account of the amount due to defendant, Woodward, on his mortgage; and the defendant, Andrew O'Connor, was ordered to pay the amount which might be so found due to the plaintiff; and, in default, the land in question was ordered to be sold, subject to the plaintiff's lien for maintenance, and the purchase money applied first in payment of the arrears found due to plaintiff, together with her costs of suit and the residue was ordered to be applied in payment of the mortgage to the defendant Woodward. (The decree did not dispose of any balance which might remain after payment of the mortgage, but it appeared to the Referee on the application that the defendant O'Connor would clearly be entitled to it. The bill was taken *pro confesso* against him).

In pursuance of the decree, the Master at Barrie duly settled an advertisement of sale, and appointed the 28th of February, 1874, as the day of sale. On that day the property was put up at the hour appointed, but, there being no bids, the plaintiff's solicitor's clerk, who had the conduct of the sale, took it upon himself to adjourn the sale for an hour, and the property was subsequently, at the expiration of the hour, again put up for sale, but no sale was effected, and the gentleman having the conduct of the sale again adjourned it to the 7th of March following. The affidavits were conflicting as to

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what took place on the 28th of February. According to the auctioneer's affidavit, filed on the part of the plaintiff, no bid was made except by Mr. Griffin, who had the conduct of the sale, and who expressed a willingness to bid \$400, if he could have been permitted to do so under the conditions of sale; but, according to the affidavit of the defendant's solicitor, the property was actually knocked down to him, acting for the defendant, for the sum of \$200. He, however, admitted that he neither paid nor tendered the deposit, and that he allowed the sale to be adjourned.

There was no evidence that the adjournment of the sale was advertised, or any steps taken to notify the public of the fact in the interval between the 28th of February and the 7th of March. On the latter day the property was again put up for sale, and the only bid made was one of \$50 by Mr. Strathy, on behalf of the defendant C. Woodward. This bid the auctioneer refused to accept, and, by direction of the vendor's solicitor, he declared that there was no sale, and again adjourned the sale for a week. The plaintiff's solicitor, however, subsequently came to the conclusion that he had no authority to adjourn the sale, and no further attempt was made to sell the property. The value of the land was variously stated in the affidavits as \$1,000, and from \$550 to \$700.

On the 11th March the defendant C. Woodward died, and on the 28th of March his solicitors caused to be paid into Court, in the name of C. Woodward, \$50, the amount which he had bid. No report on the sale had been made.

D'Alton McCarthy, Q. C., for the plaintiff, now applied for an order to sell the property, notwithstanding the sale of the 7th of March.

H. H. Strathy, contra.

Upon this application first coming on on the 17th November, 1874, it appeared that the suit had been revived against Hannah Roe Woodward, the executrix of deceased defendant.

MR. HOLMESTED.—There is nothing in the papers before me, and nothing in the order of revivor from which I can gather that the deceased defendant's right as purchaser of the lands in question has passed to this defendant by revivor; this right would of course go to his heir-at-law or devisee, and there is nothing before me to show that Hannah Roe Wood-

ward fills either of these characters. In the absence of the heir-at-law or devisee of the purchaser, as the case may be, I do not see how I can properly dispose of the present application, which must therefore stand over until the proper parties are notified, or proper evidence adduced to show that Mrs. Woodward is the only necessary party.

Subsequently the consent of the heirs-at-law of Cholmondeley Woodward to be bound by these proceedings was put in, together with a copy of the will of the deceased defendant.

D'Alton McCarthy, Q. C., renewed the motion.

H. H. Strathy, resisted the application on behalf of the real representatives of the defendant Woodward, who claimed to be entitled as purchasers at the sale of the 7th of March.

MR. HOLMESTED.—According to the evidence adduced on the part of the plaintiff, the land is worth \$1,000, subject to the plaintiff's lien. Mr. Strathy, in his affidavit, states that he was informed by a land agent that it was only worth from \$550 to \$700 free of all claims, but he expresses no opinion or belief as to the accuracy of this information, and as it was open to him to produce much more explicit evidence as to value, I do not think that I can attach much weight to it. He himself offered \$200 for the land, subject to the plaintiff's lien, and Wm. Cavanagh, an apparently disinterested witness, and one likely to be acquainted with the value of the land, has sworn that it is worth \$1,000, subject to this lien of the plaintiff.

If the plaintiff and the real representatives of the deceased defendant C. Woodward were the only persons interested in the suit, I confess I should feel very great difficulty in relieving the plaintiff from the position in which she has been placed by the imprudence of the solicitor. I think there can be no doubt that the sale was irregular, and that the offer of the defendant was a grossly inadequate price. It would be an extremely pernicious practice to sanction the adjournment of a sale by a vendor's solicitor, from time to time, without the approval of the Master, under whose approbation the sale is directed to take place, and without all due precautions having been taken to give proper notice of such adjournment. The inexpediency and danger of such a proceeding is very clearly illustrated by the present case. At the same

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time, I apprehend, if all the parties to a suit concur in irregular proceedings, it would not, as a general rule, be open to any of them afterwards to dispute the validity of those proceedings; and, if as I have said, the plaintiff and the defendant Woodward and his representatives were the only parties interested, I do not see how the plaintiff could be heard to dispute the validity of her own proceedings.

According to the standing conditions under which this property was offered for sale, the highest bidder is the purchaser, and the highest bidder cannot be deprived of his right by the auctioneer refusing to knock the property down to him: *McAlpine v. Young*, 2 Chy. Ch. 171. When the property was offered for sale on the 7th of March, there being no reserved bid, I think the provisions of the 31 Vict. c. 28, (O.), applied, and the sale must be deemed to have been without reserve, and therefore it was not open to the vendors, having once offered the property for sale, to refuse a bid, however small. Mere inadequacy of price, unless so great as to be evidence of fraud, is no ground for refusing specific performance of a contract *inter partes*: *Emery v. Wase*, 8 Ves. 517; nor yet for opening biddings: *Ware v. Watson*, 7 DeG. M. & G. 739; *Creswick v. Thompson*, 6 Prae. R. 52; and where the sale is by auction, that fact of itself is generally considered a bar to enquiry as to the adequacy of consideration: *White v. Damon*, 7 Ves. 30; *Ex parte Latham*, 7 Ves. 35, note; *Shelly v. Nash*, 3 Madd. 232.

Here, however, the defendant Andrew O'Connor appears to be interested in the result of the sale, and, if the plaintiff's valuation be correct, it would seem that his interest is a substantial one, as, in the event of the land realizing \$1,000, there would not only be enough to pay off the arrears due the plaintiff and the amount found due to the defendant Woodward, but a surplus besides. In any case he is interested in the land producing as much as possible, as his liability to the plaintiff and his co-defendant will be so much the more reduced. This being the case, and he having been no party to the sale of the 7th of March, I do not think the plaintiff and defendant Woodward can bind him by their irregular proceedings; although the bill is, *pro confesso*, against him, he is entitled to have the sale conducted according to the practice of the Court. I therefore think the sale to Woodward was, under the circumstances, wholly null and void. If the parties had chosen to treat the sale of the 7th of March as abortive,

there would have been no necessity for this application: *Sherwood v. Campbell*, 1 Chy. Ch. 299. I think, therefore, the deceased defendant Woodward's representatives should pay the costs of this application. The purchase money paid into Court in the name of C. Woodward may be paid out to his executors.

EX PARTE JOHNSON.

Discharge of mortgage—Executors.

Under 31 Vict. c. 20, sec. 62, (O.) one of several executors can alone execute a valid discharge of a mortgage.

[February 1, 1875.—*Blake, V. C.*]

This was a petition under the Act for quieting titles. The petitioner had executed a mortgage on the land in question, in favour of one Daniel Strong. Daniel Strong died leaving a will, by which he appointed three executors, two of whom had executed a discharge of the mortgage.

The REFEREE doubted whether this discharge was sufficient, but consulted BLAKE, V. C., who held that under 31 Vict. c. 20, sec. 62, one of several executors can alone execute a valid discharge of a mortgage made to the testator.

NOTE.—As to whether one of several mortgagees can execute a valid discharge of the mortgage, see *Matson v. Dennis*, 10 Jur. N. S. 461.

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Sale of infants' estate—Con. Stat. U.C. c. 12, sec. 50.

The Court may, under Con. Stat. U.C., c. 12, sec. 50, order a sale of infants' estate to satisfy claims of the deceased father of the infants, if it deems that course to be for the benefit of the infants.

[February 8, 1875.—*Proudfoot, V. C.*]

This motion was made on the 5th February, 1875, for an order under Con. Stat. U. C., cap. 12, sec. 50, for the sale of lands of infant children of a person who had died intestate, or a portion thereof, to satisfy the claims of creditors of the intestate, including a mortgage debt which covered the whole of the lands.

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MR. HOLMESTED thought that the Act did not contemplate a sale for such a purpose, but was confined to cases where a sale is necessary for the purpose of providing for the maintenance of the infants, or where their property is exposed to waste and dilapidation or to depreciation from any other cause ; but that the mere fact of the existence of debts was not of itself evidence that the property would be liable to depreciation ; and that was all that was shewn in this case. At the request of the petitioner's solicitor, however, he adjourned the matter to enable the applicants to obtain the opinion of a Judge.

On February 8th, 1875, the application was renewed.

W. G. P. Cassels for the applicant, cited *re McDonald*, 1 Chy. Ch. 97.

PROUDFOOT, V. C., said, that the case cited was authority for such an application as the present. He made an order directing the Master to enquire what property, real and personal, the intestate was possessed of, and what claims there were against him ; and to report whether or not it appeared to him to be for the benefit of the infants, that the land, or any portion thereof, should be sold, stating his reasons. Further directions reserved.

The Master subsequently reported that a sale of part of the lands would be for the benefit of the infants on the ground that the rental of the lands would not enable the administrator to pay off the sum remaining due on the mortgage in the time required and that the whole of the lands might be liable to be foreclosed ; that in view of the other debts of the intestate and of the costs incurred in this matter it was desirable that part of the land should be sold ; that creditors were pressing, and could not be paid except by a sale ; that there being eighteen infants, besides adults, interested in the lands, no benefit could accrue to them except by a sale, as the portion sought to be sold was unproductive and could not be made productive to any extent without erection of buildings and there was no funds of the estate available for this purpose. A sale was therefore ordered.

Order granted.

RE C. K. & C. SOLICITORS.

Solicitors' Act, C. S. U. C., c. 35, sec. 29—Taxation—Fees of Counsel.

A bill for counsel fees exclusively, may be referred to the taxing officer for taxation.

[March 8, 1875.—*Blake, V. C.*]

A. J. Cattanach presented a petition on behalf of certain barristers and solicitors, alleging that the petitioners had been employed by the Merchants Salt Company to assist in the defence of a certain suit in which the company were defendants ; that they had performed the business, and rendered their bill in the usual way ; that it had not been paid ; and praying a reference to taxation in the usual terms. From the affidavit of Mr. Crooks, filed in support of the petitioners, it appeared that the firm of Crooks, Kingsmill & Cattanach were carrying on business in partnership as barristers and solicitors ; that by special arrangement, the deponent attended exclusively to counsel business, but that the moneys earned by all the partners, whether as solicitors or counsel, formed one common fund ; that the deponent was employed by the company to assist in their defence ; and that he accepted the employment for the benefit of the firm, and performed the services required. The bill of costs produced, showed that the services in question were exclusively for services rendered as counsel.

The affidavits filed by the respondent, denied that there had been any retainer of the petitioners as solicitors.

The matter came originally before the Referee, but he having formerly been engaged as counsel for the Salt Company, in reference to the same suit in which the business in question had been performed, refused to entertain the application, and referred the matter to a Judge, and it subsequently came on for hearing before *Blake, V. C.*

J. Caswell, for the defendant. The bill which is sought to be taxed, is a bill for counsel fees ; it is not for business performed by the petitioners as solicitors, and therefore C. S. U. C. cap. 35, has no application, and the Court has no jurisdiction on a summary application of this kind at the instance of counsel to refer the bill to taxation. We deny that these gentlemen were ever retained as solicitors ; and unless there has been a retainer as solicitors, the Court has no jurisdiction.

Chy. Cham.]

TORONTO GRAVEL ROAD Co. v. TAYLOR.

[Chy. Cham.

BLAKE, V. C.—(Without calling on the solicitor for the petitioners).—I am not at all prepared to perpetuate the old idea, that the fees payable to counsel are a mere honorarium, and therefore cannot be recovered by suit or other proceedings. The Court, by its general orders, has assumed to regulate the fees payable to counsel both as between party and party, and between solicitor and client; and I think that the bill, although exclusively for counsel fees, may very properly be referred to the taxing officer to moderate. I am aware there is no precedent for the order I am about to make, but I shall leave the respondents to appeal from this decision to the full Court, if so advised. I refer the bill to taxation on the usual terms.

Application granted.

TORONTO GRAVEL ROAD Co. v. TAYLOR.

Discovery and production—Privileged communications.

In a suit to restrain the infringement of a patent, the plaintiffs objected to produce documents described as "professional opinions of the writers of them," (who were engineers) "as to the validity of the patent, the subject matter of this suit," claiming that they were privileged communications:

Held, that documents of this description are only protected where they have been obtained in view of or in anticipation of litigation which has actually taken place, and in which the discovery is sought.

[March 10, 1875.—*Referee.*]

This was a suit for the infringement of a patent.

The present application was made by defendants for the purpose of compelling the plaintiffs to produce three letters which they objected to produce. The managing director of the plaintiffs' company thus stated his reasons for objecting to produce the documents in question:—"I further say that my reasons for so objecting are, that the said documents are professional opinions from the writers of them as to the validity of the patent, the subject matter of this suit, and that they relate exclusively to the plaintiffs' case and to the evidence by which the plaintiffs' case is to be established, and therefore I claim that they are protected and exempt from discovery." The letters were stated to be from engineers. Two of them were dated 10th December, 1871, and the other the 11th January, 1872. It appeared from the pleadings that the plaintiffs'

patent was granted in March, 1871, and that in May, 1871, the plaintiffs applied to the United States government for a patent for the same invention, and that their application was rejected for want of novelty. The present suit was not commenced till December, 1874, and the alleged infringement which was complained of appeared from the pleadings to have taken place during that year.

W. G. P. Cassels, for the defendants.

C. Moss, for the plaintiff.

MR. HOLMESTED.—I do not think it can be maintained that the documents in question were procured with a view to the present litigation, although I think it might be reasonably inferred that they were obtained with a view to the possibility of some litigation arising as to the validity of the patent; that, however, does not appear to be a sufficient ground for exempting them from production. The cases, I think, go no farther than to protect communications of this kind which have been obtained with a view to, or in anticipation of, the litigation which has actually taken place, and in which litigation the production is sought.

In *Ross v. Gibbs*, L. R. 8 Eq. 522, Stuart, V. C., said: "Communications with a professional, or even an unprofessional agent in anticipation of the litigation, and with the view to the prosecution of a claim, or a defence against a claim to the matter in dispute, being confidential, are privileged." *Cossey v. L. B. & S. Coast Ry. Co.*, L. R. 5 C. P. 146, proceeds on the same principle. There the defendants after claim made, but before litigation was commenced, or was formally threatened, sent their medical officer to examine and report to them on the nature of the plaintiff's injuries, in order that defendants might determine whether they ought to yield to or resist the plaintiff's claim for damages for personal injuries sustained by him in an accident on the defendants' line, and it was held the report of the medical officer was privileged. There, however, the claim for which the action was brought had been made, and the litigation, though not actually commenced, or even threatened, was nevertheless imminent.

Here the refusal of the United States government to grant a patent might possibly have created doubts as to validity of the Canadian patent, and it may have been with a view to be forearmed in the event of any litigation arising that the opinions in question were procured, but

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I have not been able to find any case which has gone the length of establishing that opinions so procured are to be deemed privileged.

The allegation that the documents relate exclusively to the plaintiff's case is also insufficient: see Kerr on Discovery, pp. 171-3, and *Boyd v. Petrie*, 17 W. R. 903.

The plaintiffs must, therefore, produce the documents in question. The costs of the former applications, which were by consent to be disposed of on the present motion, I think should be paid by the plaintiffs, and the costs of the present application I think should be costs in the cause.

QUANTZ v. SMELZER.

Parties—Con. Order 57.

The rule that all parties interested in the subject matter of a suit, must be before the Court, should only be relaxed under Con. Order 57, where the interests of justice manifestly require it.

A suit was brought to set aside a will, and the persons interested under the will, as well as those interested as next of kin or heirs-at-law in the event of the will being set aside, were made parties. Defendant, Mary Smelzer, one of the heirs-at-law, died subsequently to the institution of the suit.

Held, that the suit should be revived against the representatives of Mary Smelzer; and that although their interest was represented by other parties to the suit, Con. Order 57, did not apply, as they might afterwards bring another suit to impeach the same will in case this suit failed, and no sufficient reason was given to justify the suit being proceeded with in their absence.

[April 12, 1875.—Chancellor.]

The bill in this suit was filed to set aside the will of one Peter Puterbaugh, by a person entitled as one of the next of kin and heirs-at-law. Mary Smelzer, who was sister of Peter Puterbaugh, and entitled under his will to an annuity for life, had been made a party as one of the next of kin and heirs-at-law subsequently to the filing of the bill. Mary Smelzer died, and the plaintiff had set the cause down for hearing without reviving the suit against her representatives.

The present motion was made by defendant to strike out the case from the hearing list, and for an order directing the plaintiff to revive within a limited time, or that in default the bill be dismissed.

J. H. Ferguson for the applicant. The representatives of Mary Smelzer should be parties in order that they may be bound by the decree, and prevented from hereafter attacking the will.

J. Tilt, for Daniel Smelzer, in the same interest.

MacLennan, Q. C., for the plaintiff. The interest of the persons sought to be added, is represented by the plaintiff and by several of the defendants, so that Consol. Order 57 applies, and the Court may adjudicate on the questions arising under the will in this suit, without adding as parties other persons interested in the same as those already made parties to the suit. See *Swallow v. Binns*, 9 Ha. App. 47; *Parnell v. Hingston*, 3 Sm. & Giff. 337.

Hoskin, Q.C., *VanKoughnet*, and *Warmoll*, for defendants, in the same interest as the plaintiff.

Bain, for Joseph Smelzer, who was interested under the will, but who would also take a share if the will was set aside, favoured the prosecution of the suit as at present constituted.

J. Tilt and *Ferguson* in reply. Order 57 applies where the question before the Court is the settlement of the interests of parties under a valid instrument, but it does not apply where, as in the present case, the instrument itself is attacked: *Chadwick v. Cook*, 32 Beav. 70; *Doody v. Higgins*, 3 Ha. App. 33.

SPRAGGE, C.—Since this application was made, I have looked at the papers put in, and have examined the cases.

If a decision of the case were final and binding upon all parties interested, as well those not made parties—the heirs of Mary Smelzer, as those who are made parties, I should think the proceeding in the absence of the former open to less serious objection than I do; because the interest of the absent parties is sufficiently represented by the parties and their rather numerous counsel, who appeared for them upon this application.

But it is another principle that is involved in proceeding in the absence of the heirs of Mary Smelzer, viz., that the defendants who support the will impeached in this suit, would, if successful in this suit, be liable to have the same question tried over again at the suit of other parties in the same interest; and in the meantime could not feel safe in dealing with the property. It offends against the maxim, *nemo debet bis vexari pro una et eadem causâ*.

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[Chy. Cham.

General Order 57, following the English statute, does indeed enable the Court to relax the rule, but I think it should only be done where the interests of justice manifestly require it. It is a matter of the highest importance that litigation should be final.

None of the cases that I have seen, involves so great a departure from the maxim that I have quoted, as would the allowing this cause to proceed in the absence of the parties whose absence is objected to upon this motion. I do not say that it would in no case be proper to act upon the order in a case where the parties absent had the like interest; but it would be necessary to shew very clearly to the Court the necessity for proceeding in their absence—that requiring their presence, would, from the number of parties or other cause, make the cause so unwieldy that it would be scarcely possible to bring it to a hearing. Something to this effect was stated by counsel opposing the application, and I expected to find among the papers affidavits shewing this to be the case, but I find none.

There is, however, a point in the case which I should desire to see cleared up. The death of Mary Smelzer occurred, it appears, in May, 1874. If that fact was known to the defendant who makes this application or to his solicitor, and was advisedly withheld from the plaintiff and his solicitor; and if the fact was unknown or became known only recently to the latter, I should refuse to interfere: it would be a wilful and improper delaying of the cause, and the party making such delay, must take the consequences. In such case, if he runs the risk of being twice sued for the same cause of suit, it is his own fault. The affidavits on both sides are silent upon this point. I desire to be informed. If the affidavit of the applicant on this motion, and of his solicitor are satisfactory upon this point, I think it will be proper to postpone the hearing of this cause to the autumn sittings of the Court.

The letter of the defendants' solicitor informing the plaintiff's solicitor of the names and places of residence of the heirs of Mary Smelzer, is very indefinite as to one "Mary Ann Johnston, wife of Joseph Johnston, of Michigan, U.S." If more exact information of the residence of this person can be given, it should be given.

A satisfactory affidavit was subsequently put in by the solicitor for defendant, shewing that there had been no concealment from the plain-

tiff's solicitor of the fact of Mary Smelzer's death. An order was therefore issued postponing the hearing.

Application granted.

WATSON v. WATSON.

Death of co-defendant—Revivor—Dismissing bill.

A bill was filed against two executors and other persons. One of the executors, against whom charges of breach of duty were made by the bill, died. A motion by the surviving defendants, including the co-executrix of deceased defendant, to compel the plaintiff to revive, or in default, that the bill be dismissed, was refused.

Held, that the proper parties to make such an application were the representatives of deceased defendant, and that the surviving defendants might move to dismiss for want of prosecution in the usual way.

[April 13, 1875.—Referee.]

The bill in this cause was filed against the present applicants and one James Somerville, since deceased, who was co-executor of the defendant Jane Watson of the estate of which administration was sought in the suit. The bill charged the deceased executor with breach of duty. The present application was made on behalf of the surviving defendants, "for an order that the plaintiffs revive the suit, (within a limited time) and in case they did not so revive, that the bill might be dismissed, as against the defendants applying, for want of prosecution, with costs."

J. Tilt, for surviving defendants.

T. D. Delamere, for plaintiff.

MR. HOLMESTED.—Supposing that the plaintiff seeks to charge the estate of the deceased executor, the suit has become defective by the death of Somerville, but I am not clear that it is not open to the plaintiff to proceed against the surviving executrix alone, if he choose to waive his right as against the deceased executor: see *Clouston v. McLean*, 14 Gr. 261.

But whether the suit has become defective or not, I do not think the surviving defendants are entitled to make the present application. I have looked into the practice, and can find no precedent for such an application on the part of surviving defendants. They may move to dismiss for want of prosecution in the usual way notwithstanding the death of a co-defendant:

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Williams v. Page, 24 Beav. 490, but they cannot call upon the plaintiff to revive against the representative of a deceased defendant. The proper parties to make such an application are the representatives of the deceased defendant: see Daniel Pr., 5th ed., 717, *Burnell v. Duke of Wellington*, and other cases there cited. The present application, therefore, must be refused with costs.

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Arbitration—C. S. U. C. c. 22, s. 167.—Effect of insolvency of parties to an agreement to refer.

By the terms of a contract between Catlin & Co. and the defendants, a railway company, it was agreed that all matters in dispute between the parties arising or to arise out of or connected with the contract should be settled by arbitration. Catlin & Co. became insolvent and this suit was brought by their assignee in insolvency to recover the cost of the construction of the railway.

Upon the application of the defendants under sec. 167 of the C. L. P. Act (C. S. U. C. c. 22) an order was granted staying all proceedings in this suit, it being held that the circumstance that the contractor had become insolvent did not take the case out of the statute.

[April 19, 1875—*Chancellor, on appeal from Referee*]

This suit was brought by the plaintiff as assignee in insolvency of A. L. Catlin & Co. to recover the cost of the construction of the applicants' railway. It appeared by the terms of the contract entered into between Catlin & Co. and the railway company set out in the bill, that it was agreed that all matters in dispute between the parties thereto, arising or to arise out of or connected with the contract, should be left to the arbitration of the chief engineer as sole arbitrator; or in case he should not act, or either party should be dissatisfied with his decision, then there was a provision for the appointment of an arbitrator by each of the contracting parties, with power to the arbitrators so appointed to appoint a third, and the decision of the arbitrators, or a majority of them, was to be final.

The defendants, the railway company, relying on this statement in the bill, now moved to stay proceedings under C. S. U. C. c. 22, s. 167.

J. A. Boyd, for the motion. The agreement to refer being an integral portion of the contract, passed with the contract to the assignee. If

this had not been a voluntary assignment, it might be reasonably held as in *Pennell v. Walker*, 18 C. B. 651, that the estate being cast upon the assignee by law, he does not take under the insolvent, but rather against him. Where, however, as in this instance, the assignment is a voluntary one, the assignee takes the contract *cum onere*. He cited *Ex parte Michie*, 1 M. D. & DeG. 181; *Yarrington v. Lyon*, 12 Gr. 308; *Becher v. Blackburn*, 23 C. P. 207; *Holland v. Cole*, 1 H. & C. 67; *McGee v. Rankin*, 29 U. C. Q. B. 257; *Kitchens v. Turnbull*, 20 W. R. 253; *Willesford v. Watson*, L. R. 14 Eq. 572, and 8 Chy. 473; *Plews v. Baker*, L. R. 16 Eq. 564; *McInnes v. Western Assurance Co.*, 5 Prac. R. 242, 30 U. C. Q. B. 583; *White v. Kerby*, 2 Chy. Cham. 414.

J. C. Hamilton, objected: (1.) That the matter was beyond the jurisdiction of the Referee. See *Scott v. Avery*, 5 H. L. C. 811. (2.) That two persons, Smith and Baylis, to whom an assignment had been made by way of mortgage of the contract to secure moneys advanced, were not before the Court. (3.) That the C. L. P. Act was inapplicable in consequence of the assignment in Insolvency. See *Pennell v. Walker*, 18 C. B. 651.

MR. HOLMESTED.—I do not think this is a case within the meaning of the statute. In *Sturges v. Curzon*, 7 Ex. 17, and *Pennell v. Walker*, 18 C. B. 651, the Court refused to stay proceedings as against an assignee in insolvency in the one case, and an assignee in bankruptcy in the other. *Sturges v. Curzon*, it is true, was a decision before the C. L. P. Act, but the other case was decided after the passing of the C. L. P. Act, and *Sturges v. Curzon*, was held to be still binding. The reasons which induced the Court in *Pennell v. Walker*, to refuse to stay proceedings, apply to the present case. The rights of creditors present an insuperable obstacle to the success of this motion. An assignee in insolvency does not, in my opinion, claim through or under the insolvent within the meaning of the statute, even though the insolvent's estate is vested in the assignee by means of a voluntary assignment. The assignee claims the assets of the insolvent, as an officer of the law, and in his hands the debts due to the insolvent's estate are not in all cases subject to the same rights and liabilities as between him and the debtors, as they would be between the debtors and the insolvent himself; the right of set-off, for instance, is practically taken away by the Insolvent Act, and the debtor having a contra claim against the insolvent, is left to prove his

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claim against the estate of the insolvent, and is only entitled to such dividend thereon as the estate will pay him in common with other creditors ; and he cannot apply his claim to the reduction of his own liability to the insolvent's estate.

The statute can only be intended to apply to parties claiming through the original contracting parties who are bound by the same equities as they were bound by, *e. g.*, heirs, executors, or administrators, and cannot, I think, be properly extended to those whose claim to the subject matter of dispute, though derived from or through the original contracting parties, is nevertheless more extensive and freed from liabilities in respect of the claim which the original contracting parties would have been liable to. Here the plaintiff not only represents the insolvents, but he represents their creditors also, and in some sense claims through them, at all events so long as there are any unsatisfied claims against the insolvent's estate.

Inasmuch as it is clear that the staying of these proceedings and compelling the plaintiff to resort to arbitration, might obviously operate injuriously to creditors ; and the plaintiff opposing such a step. I think I have no power to make the order asked ; and I think this motion should therefore be refused with costs.

The defendants appealed on the 19th of April.

J. A. Boyd, for the appeal.

J. C. Hamilton, contra.

SPRAGGE, C.—This case seems to me to fall within section 167 of the C. L. P. Act.

It is part of the original contract that questions between the Company and the contractors should be referred to arbitration. It was competent to the parties so to agree, and the terms in which they have so agreed, are sufficiently comprehensive to embrace all the questions in this suit : *Willesford v. Watson*, L. R. 14 Eq. 572, and same case in Appeal, 5 Chy. 473.

It appears to me that the circumstance of the contractor having become insolvent, does not take the case out of the statute. *Pennell v. Walker*, is distinguishable. There were cross actions in that case one for goods sold and delivered, (timber) the other for damages for not delivering timber according to contract ; these cross claims could not be the subject of mutual set-off. Pending these cross actions, an agree-

ment was come to to refer them to arbitration, and a Judge's order, by consent, was obtained, but before anything was done upon it, one party became bankrupt, and the Court held that the assignees had the privilege of repudiating the agreement of the bankrupt to refer to arbitration, and treated the agreement to refer as a failure, for which no one was responsible. There was not in the original contract in that case, any agreement to refer to arbitration disputes which might arise between them ; and there is no intimation of opinion in any of the judgments delivered, that such a case would not be within the statute.

In *Ex parte Michie*, 1 M. D. & DeG. 181, there was what the Court held to be equivalent to an agreement by the bankrupt when *sui juris* to refer to arbitration. The question was, whether what had been done amounted to an agreement ? the Court held that it did, and gave effect to it ; *a fortiori*, would not the Court have done this if the original contract had in terms agreed to refer matters in dispute between the parties to arbitration, as was the case in *Willesford v. Watson*. In *Ex. p. Michie*, the case put by Sir John Cross, shews plainly his opinion that such an agreement to refer, would be binding upon the assignees : "Suppose a trader when he makes a purchase of goods, says to the vendor, 'I will pay you for these goods as soon as an arbitrator shall say I should pay.' Would not this be binding upon the assignees ?"

I see nothing in the questions arising between these parties that I can feel that I have a right to say ought to be withdrawn from the forum which the parties themselves agreed should adjudicate upon them. Upon this point, I refer without quoting it, to the language of Lord Selborne and L. J. James, in *Willesford v. Watson*, and I refer to the language of the same learned Judges upon the point raised by Mr. Hamilton, that Smith and Baylis should have been made parties to this application.

I confess I should have been surprised to find any authority for holding that the assignees of an insolvent could take the benefit of a contract made by him otherwise than *cum onere*—that they could repudiate one part of the contract and avail themselves of the rest.

I have examined the case of *Scott v. Avery*, 5 H. L. C. 811, referred to by Mr. Hamilton. It is not an authority against this application. The action in that case, was brought before the Imperial Act containing the clause corresponding to section 167 of our Act, was passed, and

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certainly shakes rather than confirms the old doctrine that parties cannot, by agreement, oust the jurisdiction of the Court. That point at all events, was settled by the C. L. P. Act, first in England and then in this country, and settled, I may be allowed to add, in a common sense way.

Application granted.

MITCHELL V. MITCHELL.

Opening biddings—Con. Order 388—Special grounds.

After a sale under a decree or order, biddings will not be opened merely upon the offer of an advanced price, whether the purchaser at the sale is a stranger to the suit, or a party allowed by an order of the Court to bid.

[April 26, 1875.—*Chancellor*, on appeal from *Referee*.]

Motion to open biddings. The plaintiff who had the conduct of a sale, was, by a special order, given leave to bid, and the property was knocked down to him for \$3,200. The defendant who had not attended the sale, now moved to open the biddings, offering \$5,500 for the property. Evidence was put in to shew that one Brown had contemplated attending the sale, and was prepared to bid \$4,700, but owing to his having mistaken the hour of sale, he had not been present. The plaintiff admitted that, rather than let the property go, he would have given \$7,000. No irregularity was shewn in the proceedings at the sale.

F. Arnoldi, for the motion. The plaintiff being the vendor, it was his duty to obtain the best price possible for the property, and knowing that the defendant was not going to bid, he should have had the conduct of the sale transferred to defendant. The facts that he both retained the conduct of the sale and purchased at it, and that at a grossly inadequate price, constitute *special grounds* within the meaning of Consol. Order 388, upon which the biddings may be opened. See *McDonald v. Gordon*, 2 Chy. Ch. 125.

W. G. P. Cassels, for the plaintiff. The biddings can only be opened upon fraud or misconduct being shewn in the proceedings at the sale. The only ground shewn is, that a higher price can now be obtained. This is insufficient. See *Dickey v. Heron*, 1 Chy. Ch. 149; *Creswick v. Thompson*, 6 Prac. R. 52.

MR. HOLMESTED thought that under *McDonald v. Gordon*, 2 Chy. Ch. 125, and *McAlpine v. Young*, 2 Chy. Ch. 171, sufficient special grounds were shewn within the meaning of Order 388, and he gave the plaintiff the option of either taking the property at the increased price offered by the defendant, or having the property again put up for sale with that as the upset price; defendant to take the property at that price if no higher bid should be obtained, and to pay all costs of the application and resale.

The plaintiff appealed.

W. G. P. Cassels, for the appeal.

F. Arnoldi, contra.

SPRAGGE, C.—I do not think that it would be wise or right to make the exception contended for in the application of General Order 388. It provides explicitly that, “the biddings are only to be opened on special grounds, whether the application is made before or after the report stands confirmed.”

An order was made by one of the Judges of this Court, that the plaintiff should be at liberty to bid at the sale, he having and being allowed to retain the conduct of the sale. He did bid at the sale and became the purchaser; and application is now made to open the biddings upon an advance of price, which would have been sufficient before the passing of the General Order, although the purchaser were a stranger; but the biddings would not be opened under the circumstances if the purchaser had been a stranger, since the General Order. The short point then is, whether a party allowed by order of the Court to bid at a sale, stands upon the same, or a different footing from a stranger.

The Order of the Court is in order to remove an obstacle. It is deemed proper, for sufficient reasons as I must assume, that in a particular case, the rule against such a party bidding, shall not be allowed to prevail; and his disability is in terms removed. Upon what ground is it that the Court should hold that the disability is only partially removed; that, notwithstanding the unqualified terms of the order, there is still a qualification of his right to bid? None is to be implied, and if there was to be any, it ought to have been expressed.

The cases upon the policy of not allowing the party having the conduct of the sale to bid at the sale, have no application. They may have

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been reasons against the order being made ; but the order having been made, and the sale having taken place under it, it would be illogical and unreasonable to give effect to them now. The plain import, and I think the plain natural effect of the order was to place the plaintiff upon the same footing as any other person bidding at the sale.

I have examined the cases to which I have been referred, but for the reasons I have given, I think they do not apply to this case.

I think the biddings ought not to have been opened, and that the appeal must be allowed, but without costs.

Appeal allowed.

WINNETT V. RENWICK.

Leave to rehear—Mistake of solicitor.

Leave to rehear will only be granted under very special circumstances.

Leave to rehear was refused where two rehearing terms had been allowed to pass, through the inadvertence of the defendant's solicitor, who imagined that the defendant had a year instead of six months in which to rehear.

[May 3, 1875.—*Blake, V. C.*]

This cause was heard in October, 1874. In the same month judgment was given in favour of the plaintiff, and on the 11th November, the decree was passed.

An application was now made for leave to rehear at the next rehearing term in August, notwithstanding the lapse of time, and that the defendant had lost two hearing terms within which he might have reheard the cause.

The application was supported by an affidavit of the defendant's solicitor, which stated that the time for rehearing was allowed to pass through an oversight and inadvertence on the part of the solicitor, who imagined that a party was allowed a year from the entering of the decree within which to rehear.

C. Moss, for the defendant.

W. G. P. Cassels, for the plaintiff.

BLAKE, V. C.—The view of the Court in regard to applications of this nature, as expres-

sed by the late Chancellor VanKoughnet, in *Bank of Upper Canada v. Wallace*, 2 Chy. Ch. 169, is one in which I most heartily concur : "I agree that only under very special circumstances should the Court interfere to grant leave to appeal. '*Sit finis litium,*' is a maxim which the Legislature properly recognised, and they have fixed a year as the period during which a judgment of the Court below might be considered as uncertain, should the unsuccessful party in that interval, avail himself of the right to appeal ; and they intended that at the end of the year, if no appeal were in the meantime had, the rights secured or declared by the judgment, might be possessed unquestioned. It is of the utmost importance that this should be borne in mind, that a man may know when he can safely deal with the subject or fruits of litigation."

The only ground on which the application is supported is, that through "an oversight and inadvertence on the part of the solicitor of the defendant, the time for rehearing was allowed to pass. It is true, that in some cases the Court looks at the fact that the reason for asking an indulgence, arises from the act of the solicitor and not of the client, and where an injury of a serious nature would then arise to the party applying relaxes rules and orders which would otherwise be the means of working a great wrong. But, although this is an element for consideration where an application of this nature is made, I do not think, standing alone, that it affords a sufficient reason for granting such an order as that asked. If the case be postponed until the end of August, it is highly improbable that it can be disposed of at such a date as to allow the defendant time to take steps to remove the cause of damage to the plaintiff which arose last fall, and from which the plaintiff has always suffered so much. The delays which occur, are, whether rightly or wrongly, attributed to the Court, and it is necessary that so far as it lies in its power, this burden should cease to be borne by it. Very special circumstances from time to time arise, when it may be proper to make an exception in favour of an applicant ; but where these are not presented to the Court, if the client is aggrieved through the "oversight" or "inadvertence" of the solicitor, the injury received must be arranged between the client and his solicitor, and cannot be made a reason for the other party to the litigation, being kept before the Court another six months, and having the enjoyment of the right to which he has been declared entitled, postponed for this period. It is said that the refusal of this leave to rehear,

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will also deprive the defendant of his right to appeal. If this be so, it furnished another reason for the defendant pursuing promptly the rehearing of his cause, but I do not think it furnishes ground for giving the defendant a right to reheat, which I think he has through his neglect lost. This need not interfere with an application being made to appeal without a rehearing, when the question can be discussed as to whether the circumstances which have occurred, afford a sufficient reason for granting the leave mentioned in section 17 of the Administration of Justice Act of 1874.

The present application is refused with costs.

BOX V. BRIDGMAN.

Mortgage—Sale under prior mortgage—Effect of purchase by mortgagor on rights of subsequent mortgagee.

V. having mortgaged certain lands to G., subsequently sold his equity of redemption in a portion of the lands to B., from whom he took a mortgage, which he assigned to the plaintiff. G. subsequently sold the whole of the lands under a power of sale in his mortgage, and B. became the purchaser:

Held, that B.'s purchase under the power of sale in the first mortgage did not cut out, but enured to the benefit of, V. the second mortgagee.

[June 10, 1875.—*Referee.*]

Application by the defendant Wickett, who had been made a party in the Master's office as a subsequent incumbrancer, for leave to move to discharge the Master's order making him a party, or to apply to vary or set aside the decree, the time allowed him under the notice "T" for doing so having expired.

The facts of the case were as follows:—One Vanzandt being the owner of the land in question, made a mortgage to one Harriet Gould, and subsequently sold his equity of redemption in half the mortgaged property to one Bridgman, from whom he took the mortgage which this suit was brought to foreclose. At the time of this sale to Bridgman, Vanzandt agreed to pay off the Gould mortgage, and agreed that if Bridgman paid it off he should have credit for it on his mortgage to Vanzandt. Harriet Gould subsequently sold the whole of the mortgaged land under a power of sale in her prior mortgage, and Bridgman became the purchaser. Bridgman made a mortgage to the defendant Wickett, and subsequently Vanzandt

assigned to the plaintiff his mortgage from Bridgman.

G. B. Gordon, for the defendant Wickett, contended that the effect of this purchase was to cut out the Vanzandt mortgage, and make the mortgage to defendant Wickett the first on the property.

J. Bain, for the plaintiff.

MR. HOLMESTED.—It was claimed that the effect of this purchase by Bridgman and the sale under the power in the first mortgage was to give Bridgman an irredeemable title as against his own mortgagee. No authority is cited for this proposition, and I think it is quite contrary to principle to say that a mortgagor could defeat his own mortgage by purchasing a paramount title. If the Gould mortgage had been made by Bridgman there is express authority that Bridgman could not by purchasing under a power of sale in the Gould mortgage have defeated his subsequent mortgagee's title: see *Otter v. Lord Vaux*, 2 K. & J. 650, affirmed in appeal, 6 DeG. M. & G. 638. The present case undoubtedly differs from that in the fact that here the prior mortgage under which Bridgman bought was not made by him. But in *Otter v. Lord Vaux* the second mortgage had been made expressly subject to the first, and there was consequently in that case no obligation on the mortgagor as between him and the second mortgagee to pay off the first mortgage. It was nevertheless held that the mortgagor could not by buying under a power of sale in the first mortgage cut out the second mortgage. The principle of that case I think clearly governs the present, and I think there can be no doubt that Bridgman's purchase under the first mortgage did not cut out, but enured to the benefit of the second mortgagee Vanzandt.

Under his agreement with Vanzandt he would be entitled to credit on the mortgage he had made to Vanzandt for so much of the purchase money as would be necessary to pay off the Gould mortgage; the residue of the purchase money which Bridgman paid for the land would be applicable to the payment of the incumbrances so far as it would extend, and it would only be the balance which remained due after making such application that Vanzandt or his assignee would still be entitled to hold his mortgage for. No injustice, therefore, would be done to Bridgman.

Then it is urged that the defendant Wickett was induced to become the mortgagee of Bridgman on the assurance made by Mr. Harding who

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was acting as solicitor both for Vanzandt and Bridgman, that his mortgage would be a first mortgage on the property. It is not contended that there was any bad faith on Mr. Harding's part so that the case is narrowed down, even on the applicant's own shewing, simply to his having acted on a mistaken representation of the law by Mr. Harding. A representation made, too, under circumstances for which I do not think this plaintiff, a subsequent purchaser, is in any degree liable. There was no concealment of facts. Everything was known to Wickett or his agent, and the only question in doubt was as to the legal effect of the sale as against Bridgman's mortgage. Assuming that Mr. Harding did think, and so represented to Wickett, that

the effect of the sale was to cut out the mortgage to Vanzandt, is there any equity thereby created that would affect a subsequent purchaser (without notice) from Vanzandt, even supposing that Vanzandt would have been responsible for Harding's mistaken view of the law? there is no pretence for saying that Box had any notice of Harding's alleged misrepresentation, or of Wickett having acted on the faith of it. On that point the affidavits are silent. On the applicant's own shewing, therefore, it appears to me he has failed to make out any *prima facie* case, and that therefore the application should be refused with costs.

Motion dismissed.

C. L. Cham.]

IN RE LEWIS.

[C. L. Cham.]

COMMON LAW CHAMBERS.

IN RE LEWIS.

Extradition treaty—Certified copies of depositions—Opening railway switch to cause collision

In extradition cases the forms and technicalities with which the statute surrounds the production of affidavit evidence must be strictly complied with, and therefore,

Held, that depositions taken in the United States cannot be read unless certified under the hand of the magistrate who issued the original warrant that they are copies of the depositions upon which such warrant issued, although attested by the party producing them to be such true copies; but, *semel*, the prisoner might be remanded to enable properly certified copies to be produced.

The prisoner was charged with assault with intent to commit murder, in that he had opened a railway switch, with intent to cause a collision, whereby two trains did come into collision, causing a severe injury to a person on one of them:

Held, that this was not an "assault" within the statute.

[July 12, 1874.—*Gwynne, J.*]

The prisoner was committed by the County Judge of Wentworth for extradition under the treaty with the United States, upon a charge of having feloniously assaulted one J. H. Setchell with intent to commit murder. A writ of *habeas corpus* was issued, together with a writ of *certiorari* to bring up the evidence and papers. Upon the return of these writs,

M. C. Cameron, Q.C., moved for the discharge of the prisoner.

S. Richards, Q.C., shewed cause.

The facts of the case were, that upon the hearing before the Judge of the County Court, there was produced a copy of what was said to be, and which, by reference to the copy of warrant produced, appeared to be a copy of the original information, upon which the original warrant in the United States issued.

This information was as follows:—"State of Ohio, Hamilton County, to wit: Before me,

Fred. A. Johnson, one of the Justices of the Peace for said county, personally came John H. Setchell, who being duly sworn according to law, deposeth and saith that, on or about the 27th day of December, 1873, at the County of Hamilton, aforesaid, in the State of Ohio, one of the United States of America, Henry Lewis did unlawfully assault said John H. Setchell with intent to commit murder, and further this deponent saith not.—John H. Setchell. Sworn to and subscribed before me at the county aforesaid, this 30th day of June, 1874.—Fred. A. Johnson, Justice of the Peace."

Upon the same paper, partly printed and partly written, was subjoined the copy of warrant, which in so far as was material, was as follows:—

"The State of Ohio, Hamilton County, to wit: To any constable of Cincinnati township. Where as, foregoing complaint has been made before me, Fred. A. Johnson, one of the Justices of the Peace, in and for the county aforesaid, upon the oath of John Setchell, that Henry Lewis late of the county aforesaid, did, on or about the 27th day of December, 1873, at the county aforesaid, in the State of Ohio, one of the United States of America, unlawfully assault the said John H. Setchell, with intent to commit murder. These are, therefore, to command you to take the said Henry Lewis, &c. Given under my hand and seal, this 30th day of June, 1874.—Fred. A. Johnson, Justice of the Peace." [Seal.]

On the copy of the warrant was endorsed a certificate, as follows:—

"State of Ohio,
Hamilton Co.,
Cincinnati Town'p.
U. S. } I, Fred. A. Johnson, a Justice of the Peace for the
within County, Township,
and State aforesaid, do
hereby certify that the within is a true copy of
the original State warrant issued by me. In
witness whereof, I have set my hand and scroll
seal, this 30th day of June, 1874.—Fred. A. A.
Johnson, Justice of the Peace." [Seal.]

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The witness, Hazen, who produced this warrant, testified with respect to it before the County Judge, on the hearing of the complaint in this country, as follows:—

"The information and warrant marked B., and now produced, is a true copy of the original information and warrant issued in the State of Ohio, in Hamilton county, in the United States of America, on the 30th day of June last, against the prisoner, Henry Lewis, I compared said copy with the original."

There was produced also by the same witness copies of depositions of John Wilson, John Homer, and Daniel Thomas, taken before the same magistrate, and dated the 29th June, 1874, which were severally certified as follows:—"I do hereby certify that the foregoing is a true and correct copy of the original depositions now on file in my office. In testimony whereof, I have hereunto set my hand and seal, this 29th day of June, 1874.—Fred. A. Johnson, [Seal.] One of the Justices of the Peace, Cincinnati Township, Hamilton County, State of Ohio."

With respect to these depositions, the witness deposed, as he had in relation to the original warrant and information, as follows:—"The paper writings now produced by me, and respectively marked C. D. & E., are respectively true copies of the depositions of John Wilson, John Homer, and Daniel Thomas, being the depositions upon which the original warrant was granted in the United States; that said copies of such depositions are certified under the proper handwriting of Frederick A. Johnson, the person who issued such warrant in the United States of America; and that such copies have been examined by me and are true copies of the said original dispositions; and that such depositions were all taken the day before such warrant issued. I know the prisoner, Henry Lewis, and that he is the person mentioned in the warrant produced, and the depositions produced."

It was objected that these depositions of Wilson, Homer, and Thomas, should not have been read at the hearing before the County Judge; and that they could not be regarded on this application as admissible evidence, for the reason that they were not, as was contended, certified by the magistrate to be copies of any depositions upon which the original warrant (the copy of which has been produced) issued.

Gwynne, J.—There was nothing in the copies of the depositions to indicate any connection between them and the warrant to arrest Lewis,

further than their contents might so indicate, but these contents were as consistent with the fact of the depositions having been taken upon a mere enquiry as to the cause of the fact referred to in them—namely, the running of a railway engine and train of carriages off the track, as with that of their having been taken upon any complaint against Lewis, upon the charge mentioned in the warrant.

When a prosecutor who seeks to have a person arrested in this country for committal under the extradition treaty, finds it more convenient to use *ex parte* affidavit evidence taken abroad in preference to bringing the living witnesses for examination face to face with the accused at the hearing of the complaint, it is the right of the accused, which impartial justice and the letter and spirit of the law award to him, that the minutest forms and technicalities with which the Legislature hath surrounded the production of this species of *ex parte* testimony, shall be strictly complied with. We have no right to deprive him of the protection which the non-compliance with any of these forms may afford to him: however heinous may be the offence with which he stands charged, he has a right to insist that only legal evidence shall be received against him.

Now, the law does not authorize any evidence taken in the absence of the accused, to be read against him, unless there shall be produced, "copies of the depositions upon which the original warrant was granted in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them." In accordance with this provision, the copies of depositions sought to be used as evidence of the criminality of a person apprehended upon the charge of a crime which would subject him to extradition, must be certified under the hand of the magistrate who issues the warrant, to be the copies of the depositions upon which the warrant issued. These depositions are not so certified, although the other requirement of the statute is fulfilled—namely, that they are attested upon the oath of the party producing them to be such true copies.

The objection, therefore, to the reception of these depositions is, in my opinion, well taken, and they cannot be read in evidence against the prisoner. It is quite probable that in fact they were, as is sworn, copies of the original deposition upon which the warrant issued, but they are not so certified; indeed, the certificate, such

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as it is, which is endorsed upon them, is *itself* dated the day before the issuing of the warrant, and therefore *that* certificate never could have intended to represent that they were copies of depositions *upon which* a warrant had issued, when, in fact, no warrant *had*, at that time, so far as appears at all issued, or, if there had been one issued, it was not the warrant now produced ; and possibly, if produced, it might shew some other charge not subjecting the accused to extradition. As, however, those depositions were only material for the purpose of shewing the intent with which the act complained of was committed, I might, I think, properly remand the prisoner for the purpose of giving an opportunity to the prosecutor to produce properly certified copies of depositions, if the evidence which is independently produced, of the act complained of, shewed an offence which, if committed with the intent charged, would constitute an offence for which the accused is subject to extradition : or it may be that the oral evidence of Setchell as to the admissions of the prisoner, would afford some evidence to go to a jury for the purpose of establishing intent ; but as I am of opinion that the act complained of does not constitute an assault, however heinous the conduct of the prisoner has been, I am constrained to come to the conclusion that he is not upon this evidence, assuming the depositions rejected to be receivable, liable to extradition. The charge to be established must be that of an assault upon Setchell, made with an intent to commit murder. The act complained of as constituting the assault, is the opening of a switch upon a railroad and connecting the switch of a main line with a side line upon which latter were standing a train of cars, with a view to causing a collision of a train which Setchell was driving on the main line, with the train of cars upon the side line, and whereby, that is, consequential upon, such opening of the switch and connection thereby of the main line with the side line, the train driven by Setchell, did, at a subsequent period, run off the main line cause a collision with the train of cars on the side line, and throw Setchell off the train which he was driving, upon the ground, doing him injury ; this, in my opinion, does not constitute an assault made by the accused upon Setchell or upon any one. It shows, no doubt, a very grievous offence within the 31st sec. of 32 & 33 Vict. ch. 20, but not an assault.

In Hawk. P. C., vol. 1, p. 109, an assault is defined to be an attempt or offer with *force and violence* to do a corporal hurt to another, as by

striking him with or without a weapon, or presenting a gun at him at such a distance to which the gun will carry ; or pointing a pitchfork at him, standing within reach of it, or by holding up one's fist at him, or by any other such like act done in an angry threatening manner."

In the eighth American edition of Russell on Crimes, vol. 1, p. 750, it is defined to be, "an attempt or offer with force and violence to do a corporal hurt to another," following the definitions in Hawkins ; and the illustrations given, are, as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim ; or drawing a sword or bayonet, or even holding up a fist in a menacing manner ; throwing a bottle or glass with intent to wound or strike ; presenting a gun at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention coupled with a *present* ability of using actual violence against the person of another. In Bac. Abr. title "Assault A." it is also defined to be an attempt or offer with *force and violence* to do a corporal hurt to another, as by striking at him with or without a weapon ; or presenting a gun at him at a distance to which the gun will carry ; or pointing a pitchfork at him standing within the reach of it ; or holding up one's fist at him, or by drawing a sword and waving it in a menacing manner ; but (it is continued) if A. lays his hand on his sword, and says, that "if it were not assize time, I would not take such language from you" ; this is no assault, (and the reason is given), for it is plain he did not design to do him any corporal hurt *at that time*.

In accord with these quotations, it is held by the Supreme Court of the State of New York, in *Hays v. The People*, 1 Hill, 351, that an assault is an attempt with *force and violence* to do a corporal injury to another ; it may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention coupled with the present ability of doing actual violence against the person—taking the language as I have extracted it above from Russell.

In *Regina v. Button*, 8 C. & P. 660, it was held by Sergeant Arabin, trying the case at the Court of Oyer and Terminer, that putting cantharides into some coffee in order that a female might take it—and she did take it and was made ill by it, constituted an assault.

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In the eighth American edition of Russell, p. 751, note p., the soundness of this decision is doubted by the American annotator, for the reason that there was *no force* used by the defendant; and the soundness of the annotator's doubt is confirmed by the decision in *Regina v. Hanson*, 2 C. & K. 912, and 4 Cox Cr. Cas. 138, where such is expressly decided by Vaughan Williams, J., after consultation with Cresswell, J., not to be an assault. And in *Regina v. Dilworth*, 2 Moo. & Rob. 531, Coltman, J., also denies *Regina v. Button*, to be law, so in *Regina v. Walken*, 1 Cox Cr. Cas. 282, Parke, B., held the same.

In *Scott v. Shepherd*, 2 Black. 892, the principal upon which the majority of the Court against the authority of Mr. Justice Blackstone, held that injury done to a person by a squib thrown from hand to hand by several intermediate throwers, who only intended to defend themselves, constituted the offence of assault by the first thrower, was, that what was done subsequent to the original throwing, was merely a continuation of the *first force* involved in the act of throwing by the first thrower, which was held to continue until the projected squib burst. In a note to that case, several cases are cited, wherein the distinction between the civil actions of trespass on the case, and trespass *vi et armis*, is pointed out, which appears to afford a complete analogy to the charge of assault.

If the injury complained of be the immediate act complained of, the action must be trespass *vi et armis*, if the injury be merely consequential upon the act complained of, an action upon the case is the proper remedy. If one leave a trap door open whereby one passing along falls in and is injured, trespass *vi et armis*, will not lie—the action must be trespass on the case. If one throw a log of timber into a highway whereby some person driving along, subsequently is thrown out of his carriage and injured—trespass *vi et armis*, will not lie, but trespass on the case only, but if in the act of throwing down the log a person then passing is struck by the log and injured, the action will be trespass *vi et armis*, and not case.

Mr. Richards put the case very strongly in his argument for the prosecutor, comparing the opening and removal of the switch, whereby the train ran off the track, to a person directing a gun in the hand of another at the moment of its discharge, with the intention to hit, and so as to hit another, but the analogy, it appears to me, fails, for there the force and violence in the per-

son determining the direction of the gun (which force and violence is necessary to constitute assault,) is present. There, also, there was the present ability to do the injury intended.

The conduct of the prisoner gives us reason to regret that the terms of the treaty between this country and the United States, do not enable us to order his surrender to be tried for an offence, and a very grave felony for which, undoubtedly according to our law, he might be tried and convicted upon the evidence contained in the depositions produced; and, indeed, upon the admitted facts; but, however much I may regret that the law does not enable me to be aiding in his extradition, I feel myself bound to say that, in my opinion, he cannot be lawfully surrendered upon this charge.

I cannot conclude this case without expressing my regret that any of the authorities who have had to take part in this matter, should have suffered any portion of the evidence which was laid before the Judge of the County Court, to be withheld. An indictment found against the prisoner in the United States, was produced, and as the evidence which has been transmitted shews, was received by the Judge, but it has not been transmitted—for what reason, does not appear. There would seem to be none which could be satisfactory; it was received, and therefore should have been returned with the *certiorari*. The prisoner complains that it would have saved him if produced, as shewing the charge against him in the United States to be one quite different from that now made. Whether the indictment would have shewn that fact or not, or whether, if shewn, that would or not have been beneficial to the prisoner, matters not; it was received as evidence, and should have been forwarded here with the rest of the evidence. I am quite satisfied that the returning of the indictment to the prosecutor, if returned to him, was for the reason suggested by counsel, that it was thought it would have no bearing upon the case. But it is of the utmost importance that all persons, both prosecutors and accused persons, should have the most perfect confidence in the impartiality of the administration of justice; and I cannot too strongly express my disapprobation of suffering any portion of evidence once received by the examining justice at the hearing, to be taken from among the papers under his control, until a final disposition of the case; and I hope that such a thing will not occur again. The order will be, that the prisoner be discharged.

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Mr. Justice Wilson having considered the matter with Mr. Justice Gwynne, entirely concurred with him in the conclusion arrived at.—
REP.

IN RE CARSWELL.

Custody of infant—Right of father—Con. Stat. U. C. cap. 74, sec. 8.

The Court of Chancery has not heretofore interfered, and Courts of Common Law will not, (subject to Con. Stat. U. C., cap. 74, sec. 8,) interfere to deprive the father of his exclusive common law right to the custody of his children, except in cases where it is essential to their welfare and well-being, either physically, intellectually, or morally, that they should so interfere. It is not sufficient for the mother, claiming children as against their father, to allege that he holds what she calls dangerous and fanatical religious views (in this case those of the "Swedenborgians.") Nor will a child even though within the year of nurture be delivered up to the mother under Con. Stat. U. C., cap. 74, sec. 8, unless she establishes such a case as would justify her in leaving her husband's home.

[January 13th, 1875.—Gwynne, J.]

On the 15th of December, Robert Carswell obtained a writ of habeas corpus commanding Martha Carswell (his wife), that immediately on the receipt of the writ, she should produce the bodies of Martha Roberta Carswell and John Carswell, (infants of the age of six and-a-half years, and four and-one-half years respectively, children of the said Robert and Martha Carswell), being detained in the custody of the said Martha Carswell, together with the day and cause of their being taken and detained, together with the said writ. Upon the 18th of December, upon an application to Mr. Justice Galt in Chambers, the time for making a return to the writ was enlarged until the 29th of December.

Upon that day, the applicant Robert Carswell appeared in Chambers before the Chief Justice of the Common Pleas, being furnished with an affidavit prepared in anticipation of the expected return, as to the nature of which the applicant had formed an opinion from certain evidence recently given in the County Court of the County of Middlesex by his wife Mrs. Martha Carswell, who was examined as a witness upon behalf of her father, one Swan, in an action brought by him against her husband Robert Carswell, for the support of the wife and her infant children for about ten months preceding

the month of May, 1874. No return to the writ of habeas corpus was then filed; but at the request of counsel on behalf of Mrs. Carswell, an order was made by the Chief Justice, again enlarging the time for making a return to the writ until the 2nd of January, 1875; and it was thereby further ordered that the argument thereon on affidavits to be filed, or then filed, should be had on Tuesday, the 7th of January, 1875. The copy of the affidavit of Robert Carswell, with which he had come to Chambers on the 29th December, had been served on the solicitors acting for his wife in this matter, upon the 26th December. The case was enlarged from the 7th of January, until the 13th January, when it was heard before Mr. Justice Gwynne.

Beatty, Q. C., appeared on behalf to the applicant, and

Hector Cameron, Q. C., on behalf of Mrs. Carswell.

The following authorities were cited: Con. Stat. U. C. ch. 74, sec. 8; 29 & 30 Vict. ch. 45; *Re Leigh*, 5 Prac. R. 402; *Re Davis*, 3 Chy. Ch. 277; *Re Allen*, 5 Prac. R. 443; Taylor's Chy. Orders, 61; Story's Eq. Juris. (Ed. 1870) sec. 1347; *Curtis v. Curtis*, 5 Jur. N. S. 1147, 7 W. R. 474; *Re Newbery*, 12 Jur. N. S. 154; L. R. 1 Eq. 431; *Andrews v. Salt*, L. R. 8 Chy. App. 638, 622; *In re Andrews*, L. R. 8 Q. B. 153; *Hawkesworth v. Hawkesworth*, L. R. 6 Chy. App. 540, 542, 545; *Bazeley v. Forder*, L. R. 3 Q. B. 559; *Rex v. DeManneville*, 5 East. 221; *Anonymous*, 19 Simons, 54; *Ball v. Ball*, 2 Simons 35; *In re Finn*, 2 DeG. & S. 457.

The further facts of the case fully appear in the judgment of

Gwynne, J.—The return to the writ is as follows: That Martha Roberta Carswell and John Carswell, are the children of the said Martha Carswell; that in consequence of certain domestic quarrels, caused by the improper conduct, and personal cruelty of her husband Robert Carswell, the said Martha Carswell was obliged to leave the home of the said Robert Carswell, and the said Martha Roberta Carswell and John Carswell being very young, and of the age of six and four years respectively, and unable to have any degree of comfort without a mother's care and protection, and they desiring to go with their mother from their father's home, the said Martha Carswell took the said children away

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from her said husband's home; and the said Martha Carswell claims the right to keep and detain the said children on the ground amongst other things, that she can best administer to their various needs: and that the said Robert Carswell is not a fit person to superintend the religious training of the said children, inasmuch as he entertains and endeavours to impress on all over whom he has any influence, religious views dangerous and fanatical; and on the ground of cruelty on the part of the said Robert Carswell, to the said children, while she lived in his house, and to their mother. My attention was not drawn to this return during the argument, nor to the fact that it is not signed by Mrs. Carswell herself, but by her attorney. The case was argued upon very numerous affidavits filed upon both sides.

The form of this return would seem to indicate that an erroneous opinion still prevails as to the jurisdiction of the Courts over the common law right of a father to have the custody of his own children.

In *The King v. Greenhill*, 6 N. & M 244, in a very strong case in favor of the mother, it was after grave deliberation, held that the father is by the common law, entitled to the custody of his legitimate children even to the exclusion of the mother, although they be within the age of nurture; and it is the bounden duty of a Court of common law to take them from the mother and to place them in the custody of the father, unless there be well founded apprehensions of the father acting with extreme harshness or cruelty, or with gross profligacy, or immoral conduct, so that the child would be in danger of contamination, in which case the Court might withhold interfering to grant an order for taking them out of the mother's custody.

In *Re Hakwell*, 12 C. B. 223, decided in 1852, it is said that where the father was in possession of his legitimate children, a Court of common law had, under no circumstances, any power to control or interfere with that right. But the Court of Chancery, under certain circumstances, as exercising the controlling power of the Crown as *parens patriæ*, did and does exercise the power of removing children from the custody and care of the father.

Prior to the passing of Imp. Act, 23 Vict. c. 54, this jurisdiction was exercised in a suit, the children having, in order to its institution, been made wards of Court; and since the passing of the Act, it has been exercised in the same manner,

although it may be upon a simple petition to the Lord Chancellor or to the Master of the Rolls; but the Court of Chancery never did assume the jurisdiction to remove the children from the custody of the father, upon the ground merely that it might be more for their benefit to be with their mother; nor upon the ground of the religious opinions of the father, except so far as the law of the country regards some religious opinions as dangerous to society, or as inculcating immorality and vice: see *Shelly v. Westbrook*, Jacob 126. Sir R. T. Kindersley, V. C., in *Curtis v. Curtis*, 5 Jur. N. S. 1147, says, "This Court (of Chancery) does not exercise the jurisdiction in merely considering whether it would be for the benefit of the children that their custody should be with the father or with the mother, or with some other relative, or with strangers, simply because upon the whole, it would be most for the benefit of the children that there should be that custody. I repudiate all such jurisdiction as belonging to this Court. If such a jurisdiction existed, I suspect that the peace of half the families in this country would be disturbed by applications shewing or attempting to shew what I am afraid might be shewn in a great many cases, that it was most for the interest of the children that they should be removed from the custody both of the father and of the mother." And, again, "it appears to me the Court ought never to interfere unless in some very material and important respect it is essential to the welfare and well being of the children, either *physically, intellectually, or morally*, that it should be so." Then he says, "The cases which have most frequently occurred of the Court exercising it, have been cases where the father being of a perverted condition of mind in respect of religious and moral views or habits, is inculcating such habits, or such views and opinions upon his children in such a way as that it will be most grievously and seriously detrimental to them in after life as members of society. The Court will also interfere unquestionably where the father, although he may not in the smallest degree tend by his teaching or his example to demoralise the children, does treat them with such a degree of violence or harshness and cruelty, as that he appears utterly unfit to have the conduct or management of children." And, again, with reference to the religious opinions of the father, he says: "Now one thing is pretty evident, namely, that during the period of the married intercourse between these two parties, there have been differences of opinion upon religious questions,—the most unfortunate sort of differ-

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ence that can arise, I apprehend, between husband and wife, especially where neither the husband nor the wife seems much disposed to submit his or her opinion to the opinion of the other. Suppose that the father entertains the opinion, which I believe is entertained by a certain section of individuals called "Separatists," who deny that they belong either to the Church of England, the Church of Rome, the Baptists, the Anabaptists, the Anti-pedobaptists, the Independents, the Wesleyans, or to any denomination whatever who call themselves Christians, and assert and believe in all the truths of the Bible, but insist that there should be no Church, that every man should be his own priest, having his own place of worship, and that there should be no creed whatever by which persons might express their religious opinions. There are persons of respectability who bring up their children with these views, but nobody would suggest that they are not fit to have the care of their children."

Now the religious opinions which it is objected by Mrs. Carswell that her husband entertains are those of the body called the "New Jerusalem Church," I believe, or "Swedenborgians," and she objects that he urges upon others these opinions in season and out of season with the impressiveness and ardour of all recent converts. With these opinions or with the urgency with which they are advocated I have nothing to do, and using the language of Sir R. T. Kindersley in the above case, I repeat that, "they appear to me to form no ground whatever for interfering with the father's parental rights, unless there was such a case as I have suggested of their being merely items or ingredients in an aggregation of circumstances shewing perfectly disturbed and disordered and morbid condition of mind." In a recent case, *Andrews v. Salt*, L. R. 8 Chy. App. 636, the Lords Justices, approving of a judgment of the Lord Chancellor of Ireland in *Re Meades*, Ir. L. Rep. 5 Eq. 98, say that they entirely agree with that decision in which the Lord Chancellor of Ireland held that the Court cannot during the life time of a father compel him out of his own funds to educate a child in a different religion from his own. There have been several affidavits filed here describing Mr. Carswell, with whose parental rights I am asked to interfere, as a kind and affectionate husband and father, and as a sober, industrious, temperate, conscientious, and truthful man, of a most affectionate and kindly spirit, and of an unblemished character.

I have adverted to these points for the purpose of shewing that if I were exercising here

the same jurisdiction as the Court of Chancery has always exercised for the protection of its wards, I could not interfere to deprive the father of his parental rights in this case upon either of the two first grounds insisted upon in the return to the writ of habeas corpus, namely, that it would be more beneficial to the children, assuming that to be established, to leave them with their mother, or upon the ground of the religious opinions of the father; but the jurisdiction I am called upon to exercise is the jurisdiction as it was formerly of the courts of common law, extended as it is, and to the extent authorized, by the Con. Stat. U. C. c. 74. That Act is identical with the Imperial Stat. 2, 3 Vict. ch. 54, save that the authority given by the Imperial Act to the Lord Chancellor and Master of the Rolls is given by our Act to all the Superior Courts of law or equity in Ontario, or to any Judge of any such Courts, and with this addition, that our Act empowers, which the Imperial Act does not, the Court or Judge to make an order "for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time, as, according to the pecuniary circumstances of such father, or the value of such estate, such Court or Judge thinks just and reasonable."

In exercising this very extensive jurisdiction in control of the common law right of a father over his children, we should be well satisfied that a case is made out which justifies our interference. I have, in *Re Leigh*, 5 Prac. R. 402, collected all the cases up to that time and I do not find that any since qualify the conclusion at which I arrived there.

I come, therefore, now to consider the only remaining ground insisted upon in the return to the writ of habeas corpus as sufficient to warrant my interference to control the rights of the father in this case, namely, upon the ground alleged of cruelty on the part of the father towards the children "and to their mother" which, as has been argued, has been shewn to have been sufficient to justify, or at least excuse her deserting her home, and taking her children with her.

As to cruelty towards the children themselves, there is not a tittle of evidence offered; and as to cruelty towards the mother, I must say that it would seem as if this ground for resisting the father's application was inserted after the return had been drawn up, for the words "and personal cruelty" in the fifth line of the return, and

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the words "and to their mother" at the end of the return, are plainly interlined with interlineations in the same handwriting but quite different from that of the rest of the return.

I have considered this case as if the mother had been applying under the Act to obtain the custody of the children from the possession of the father, and I have asked myself whether the affidavits she has filed present such a case as would warrant my interfering to deprive the father of his undoubted *prima facie* right to the exclusive possession of the children, and I am compelled to say that I have with little difficulty, after a careful perusal of the affidavits, or rather of such parts of them as seemed to be material, for they contained much matter which appeared to me to be immaterial, and which had been better omitted, that Mrs. Carswell had no such cause of personal cruelty as has been insisted before me to justify or excuse her leaving her husband's home, and that she did not leave for any such cause, but, as I have formed the painful opinion, in the hope that by taking this step she would cause her own will, which, judging from the affidavits, seems to be a determined one, to triumph over that of her husband, by compelling him to abandon the Church and the opinions which he had recently adopted, and which appear to have given her much offence.

This application of the father being in assertion of his *prima facie* paramount common law right, I think Mrs. Carswell with her return to the writ of habeas corpus should have filed her affidavit, upon which she intended to rely in support of her return to the writ as precisely as if she were petitioning under the Act of Parliament to obtain the custody of the children from the possession of the father. She did not do so, she in fact has made no affidavit at all until she had seen Mr. Carswell's affidavit which he had made on the 24th December, in anticipation of her insisting, (on the return of the writ,) upon the same allegation of cruelty as it is said she had given evidence of at the trial of *Swan v. Carswell*. The applicant, the father, was not called upon to make any affidavit in support of his common law rights, until he had seen upon what affidavits his wife's claim to supersede or interfere with these rights was rested. However, he furnished a copy of that affidavit to Mrs. Carswell, and in it he professes to give what he declares upon his oath, to be very precise particulars of what he alleges to have been the only charges of cruelty insisted upon by Mrs. Carswell, as her justification, and in the plainest

language, he utterly denies the truth of these charges of cruelty. Now, independently of this affidavit, and *a fortiori* having been furnished with a copy of it, it was in my opinion Mrs. Carswell's duty to place the Court in possession of the precise particulars, with dates and circumstances of all the acts of cruelty which she intended to rely upon as sufficient to justify her breaking up her husband's home, deserting him and taking his children from him. This, she has by no means done.

[The learned Judge here referred at length to the affidavits filed.]

Taking her affidavit and contrasting it with those of her husband, the latter denies every material allegation in her's very precisely, and enters into many particulars which she leaves wholly unanswered; then the affidavit of the husband is certainly supported also by the affidavit of Mary Spooner, and also most materially by that of Mrs. Clark, Mrs. Carswell's own sister, who had abundant opportunities of judging of the conduct of the husband and wife to each other. I do not think it necessary to refer to the affidavit of Mrs. Swan which is expressed in very general terms, and which is contradicted in every particular by the affidavit of the father, who avers that, during a portion of the time to which she refers, she had not any opportunity of knowing herself anything of the particulars of which she speaks. Moreover, the affidavit of Mrs. Clark is, in effect, a strong contradiction of the allegations contained in Mrs. Swan's affidavit.

Upon the whole, I am of opinion that the evidence wholly fails to establish such a case as would justify me in declaring that Mrs. Carswell had any sufficient excuse to leave her husband's home; or that she did, in fact, leave on account of any thing which the law can pronounce to be ill-treatment or cruelty. I do not mean to say that there may not be what the law would regard as tyrannous cruelty and ill-treatment, which should be redressed, though short of actual, personal violence; and which, as in *Kelly v. Kelly*, L.R. 2 P. & D. 31, 59, would justify even a divorce *a mensa et thoro*; but there it is said that in such case, the troubles of the wife, as a condition of the Court's interference, must not be owing to her own misconduct. It is there further said in relation to cruelty: "Every thing depends on degree. Many acts which are venal in themselves, become reprehensible when they take their places as part of

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a system. Others, justifiable on occasions, lose their justification when continuously and purposely repeated. In considering a charge of cruelty, therefore, the conduct of the party inculpated can only be justified, or the reverse, as a whole. And if, upon a general review, the Matrimonial Court is of deliberate opinion that cohabitation could not be renewed with safety to the wife, it is bound, by the dictates of common sense, as well as upon principles repeatedly avowed and acted upon in a long series of decisions, to step in and forbid its resumption. No doubt in cases such as the present, where the personal violence used is of a trifling character, it behoves the Court to be sedulous in inquiry and slow in conviction. It should be entirely satisfied that the conclusion of the wife's danger is clearly reached, and on reliable evidence." But the species of tyranny appearing in *Kelly v. Kelly*, is not what is attempted to be made out here, and what has at the last moment been attempted to be made out as a last resource, if all previous defences set up should fail, namely, personal violence to an extent sufficient to warrant a wife abandoning her husband, has not been made out. That the husband may have been too urgent and importunate in pressing his peculiar religious views upon his wife, I think is very probable, but that, as I have said, is a matter with which the law cannot interfere. There should be a mutual forbearance in such cases, in order to maintain peace in a family; and certainly the wife has not, I think I may say, upon the evidence before me, adopted the most prudent course to attain her object. I would venture to advise both to agree to amend their conduct towards each other, and to come together and live in accordance with the vows they have taken as man and wife; and to forget their past differences, resolving—the husband, not to intrude his religious views upon his wife against her will, and to bear in mind that the submission due to him, is confined to what is reasonable and proper; and the wife not to irritate, if it be true, as alleged, that she has irritated her husband, by violent abuse of the religious opinions he has adopted, whatever may be her opinion as to their unsoundness—it is vain for her to abuse what she cannot amend; and men who are sincere in their convictions can least of all endure to have their religion vilified.

The only order which I feel that I can make under the circumstances is, that the children be given up to their father, as the wife has failed to satisfy me that she had any sufficient excuse for abandoning her husband's home.

REGINA V. BLAKELEY.

Arrest of person drunk, but not disorderly—Commitment without prior distress—36 Vict. ch. 48, sec. 315.

Held, 1. That under 36 Vict. ch. 48, sec. 315, where a person is ordered to pay a fine, or in default to be imprisoned, a distress must issue for the fine and be returned unsatisfied before he can be imprisoned.
2nd. A person cannot legally be arrested for drunkenness in his own house, even at the request of his own family, unless he is creating a disturbance of the peace.

[January, 27th, 1875—*Galt, J.*]

In this case prisoner had, while in a state of intoxication, so ill treated his family that they complained of him to the magistrate, and requested that he might be taken into custody, and accordingly two constables were sent for that purpose. They had no warrant to arrest him. Having taken him from his bed in his own house, they carried him to the lock-up. The prisoner having pleaded "guilty," was sentenced to be fined \$50, or to be imprisoned for sixty days. The fine not being paid, he was committed to jail. No distress warrant had issued for the amount of the fine prior to the commitment.

Strathy, on behalf of prisoner, moved on return of *habeas corpus* and *certiorari*, to set aside commitment on the following grounds:—

1. That the constables who took prisoner in charge, did so without a warrant; 2. That, in order to take prisoner in charge, they entered his house and carried him to jail, although there is no proof that he was creating any public disturbance; 3. That the conviction did not contain the clause of distress required by the statute provided in that behalf.

GALT, J.—There are certain vices which in the eye of the law, are punishable only when practised publicly—drunkenness is one of these. A man cannot, when drunk in his own house, be forcibly removed therefrom—even at the request of his own family, unless his conduct is such as could constitute him a nuisance to the public, *i. e.* by his creating a public disturbance. But apart from this, 36 Vict. ch. 48, sec. 315, imperatively requires that prior to commitment, a distress warrant must issue for the penalty, and be returned unsatisfied. Such warrant not having been so issued and returned in this case, I must discharge the prisoner.

Prisoner discharged.

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Transferring suit from Common Law Court to Court of Chancery—A. J. Act, sec. 9.

A suit will not be transferred to the Court of Chancery, with the view of being consolidated with a suit pending in it between the same parties.

[March, 1875.—*Mr. Dalton.*]

The action in the Common Law Court was brought for the infringement of a patent right. Subsequently to the institution of the suit, one of the defendants obtained a letters patent for an invention which was claimed to be only colourably different from the plaintiff's invention, and therefore void. The plaintiff then filed a bill in Chancery, claiming damages for the infringement subsequent to the commencement of the former action, and praying that defendant's letters patent might be declared void.

Muir obtained a summons to shew cause why the proceedings should not be transferred to the Court of Chancery, on the grounds, that the suit could there be dealt with more conveniently: that after the commencement of the common law suit, facts arose which could not be included therein; and that the suits were between the same parties in the same rights, and concerning the same subject matter.

J. K. Kerr shewed cause. The plaintiff's proper course, after filing bill in Chancery, was to have discontinued the suit at law, and amended the bill to cover the whole ground. Section 9, of The Administration of Justice Act of 1873, under which the transfer was sought to be made, applied only to cases in which there were equitable questions raised, *i. e.*, in which one or more of the pleas were based upon equitable grounds, and in this case there were no such questions.

Muir, contra. The same reasons which would apply to consolidate two common law suits would apply to transfer the present case to Chancery. The words, "or may for any other reason be more conveniently dealt with in Chancery," show plainly that cases of transference are not to be confined to those where "equitable questions," are raised. By sec. 25 of "The Patent Act of 1872," it is provided that in certain cases, of which this is one, "the Court may discriminate, and the judgment may be rendered accordingly." And by sec. 27 of same act it is proved that the patentee is entitled to the remainder of his patent *pro tanto*, the Court shall render a judgment in accordance with

the facts; * * * and the patent shall be held valid for such part of the invention described;" and in all likelihood from the issues raised, such a judgment would be necessary in the common law suit. Under such circumstances, the Court of Chancery was better fitted by its constitution and machinery, to deal with the issues than a Court of Common Law: *Falls v. Powell*, 20 Gr. 454.

MR. DALTON.—Section 9 of the Administration of Justice Act of 1873, is not confined to cases only where equitable questions are raised. Court of Common Law can as conveniently deal with and decide cases arising out of the 25th and 27th section of "The Patent Act of 1872," as a Court of Equity. The summons must be discharged.

Summons discharged.

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Custody of infants—Foreign parents—Lex loci.

The parents of the child were foreigners. They lived apart, and had brought cross actions for divorce in the U. S. Courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that by the law of the State of Michigan she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of twelve, subject, however to the right of the Court to interfere with and remove it for cause assigned. An *ex parte* order had been made in April, 1875, in the wife's divorce suit in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child.

Held, that the parents being foreigners, and the domicile of the child not having, under the circumstances, been changed, the law of the State of Michigan must govern; but that the order in favour of the wife being *ex parte*, and the foreign judgment not being conclusive (23 Vict., cap. 24), it was competent to consider the "cause assigned" by the father; and so it was *held* (especially in view that the divorce suits would be tried in a few weeks' time, and so settle the merits of the case), that the mother having voluntarily given up the custody of the child to the father, she should not, under the present facts, have it re-delivered to her.

[April 15, 1875.—*Wilson, J.*]

In this case a habeas corpus was granted at the instance of Mary A. Kinney, the mother of the child, directed to John Henry, of the township of Clinton, in the county of Lincoln, to bring

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up the body of Laura Lenore Kinney, that "what of right, and according to law, we shall see fit to be done," might be caused to be done.

The return to the writ stated that one John Henry had possession of the child under an indenture of the 15th of May, 1874, between George V. Kinney, the father of the child, of the one part, and John Henry and Caroline his wife of the other part, whereby the latter agreed to bring up the child until she should be of the age of twelve years.

The material facts appeared to be as follows:—The parents of the child were citizens of the United States. They resided in the State of Ohio in the year 1868, at the time of their marriage. That was the residence of the parents of Mrs. Kinney, and the marriage took place there. Shortly after the marriage the husband and wife removed to the State of Michigan, where they resided ever since, and where their child was born in the year 1869. In April, 1874, a separation took place between them in consequence of suspicions which the husband entertained as to the infidelity of his wife. The wife afterwards commenced proceedings for a divorce from her husband in the Circuit Court of Calhoun County, in the State of Michigan, on the ground of extreme cruelty, which suit was subsequently discontinued. The husband, after the institution of that suit, took proceedings in the County Circuit Court for Jackson, in the same State, for divorce from his wife, on the ground of adultery, which suit is still pending, and will be, it is said, tried in the month of June now coming. Since then the wife commenced a new suit for divorce against her husband on the ground of extreme cruelty, and in that suit she also claimed the possession and custody of her child. The last suit was brought in the same County Circuit Court in which the husband's action was brought. In the last suit of the wife an order of the Court was made, dated the first of the present month of April, which recited the bill of complaint filed by the wife against her husband, in which it was alleged the husband was an improper person to have the care and custody of the child, and that he had removed the child to Canada with intent and design to vex and oppress his wife, and to place the child beyond the jurisdiction of that Court, and then directed that the wife should have the care, custody and control of the child during the pendency of the suit, and until the further order of the Court; and that George V. Kinney should deliver up to

his wife the custody of the child within ten days after the service on him of a certified copy of the order. The order had the seal of the Court. It was not signed by any officer of the Court. It was certified by the Deputy Registrar of the Court as a true copy of the order "entered in the annexed entitled cause in said Court as appears on record in my office; that I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof." The affidavit of the professional legal gentleman acting for the wife, who verifies the copy of the order, stated, that "By the Session Laws of 1873, of the said State of Michigan, a mother is entitled to the care, custody and control of her infant children under the age of twelve years, when she is living separate and apart from her husband, subject to the right of the Court to interfere with and remove the children from her custody for cause assigned. The said Mary A. Kinney and George V. Kinney are citizens of the United States."

The wife denied the truth of the charge made against her by her husband. The husband denied the charge made against him by his wife, and re-asserted the truth of the charge he preferred against her. He alleged that he had prosecuted the person who had had, as he says, criminal intercourse with his wife, and that the jury did not agree on a verdict on the trial, and that he would be able to prove the truth of the charge in his divorce cause.

He said that his wife gave him, voluntarily, the following document:

"County of Jackson, } I, Mary A. Kinney, for
State of Michigan. } good and sufficient cause
known to me, and to me only, do resign all
claims that I now have, or may have, to the
person or custody of my child Laura Lenore
Kinney to her father, George V. Kinney, of the
Town of Concord, County of Jackson, State of
Michigan, and to him only, till she, the said
Laura Lenore Kinney arrives at the age of
twelve years (12 years). The said child will be
five years of age on the 27th day of August,
A.D. 1874. I make the assignment of all claims
without any coercion on the part of the said
George V. Kinney or any other party, and of
my own free will.

(Signed) MARY A. KINNEY.

Dated Concord, July 7th, 1874.

Signed in my presence:

(Signed) J. M. DODGE, J. P.
(Signed) HELEN O. PADDOCK.

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The wife stated with respect to this paper, that her husband met her at her request at the city of Jackson on or about the third day of July last, when he proposed to settle all matters between them without a divorce, and that they should live together again, but he said he would have to let the suit stand against the person he charged with having had criminal intercourse with his wife, as he feared that person would prosecute him for false arrest and for libel, if he dropped it, and that she (the wife) had better go to her father's, and live there in the meantime. She thought if they would settle their differences it would be better for all parties, and she asked him if he would not bring home the child. He said he had bound her out to Mr. Henry, but he did not think she was there then; and he did not think he could get her unless she (his wife) would sign a paper releasing all her right to the child. She said she could not do so, as the child was all she had in the world; and he replied that it would not make any matter, as he would destroy the paper as soon as they came to live together, which they then intended to do; or if they did not live together again, that he would give the paper back to her. That he then wrote it, and gave it to her to copy, and they drove together to the village of Concord. That he proposed she should meet him the next day, which she did, and they had a long conversation as to their future plans and business. She urged him to do without the paper, but he continued to press her for it, saying he could not get the child, that it would be all right, and would be no trouble to her. With much reluctance she agreed to do so, and on her return to the house she copied it out, and had it witnessed as he had instructed her, and sent it to him through the post, as he suggested to her to do. That she had no intention of admitting by the paper any misconduct on her part, but it was given solely for the reason before stated.

The husband denied this account of the giving of the release. He said he did not draft it nor dictate it, and he did not know it was in contemplation till he received it with the letter, of which the following is a copy:

"My husband :—I give up my claims to *our child*, that you may bring her back into your own care. I beg you to be father and mother both to her. Guard her from malicious persons who would poison her mind against her mother—that one thing I ask of you for the sake of the past to teach her if *possible* to live and respect the name and memory of her mother.

(Signed) MARY A. KINNEY."

And he further said he never promised to give her the child or to live with her again.

Osler appeared for the mother.

Hagle for the father.

WILSON, J.—It appears that the husband and wife are the citizens of a foreign country, and it must follow that the infant child placed in this country for a time only, and probably for a special purpose, has not acquired in law a different domicile from that of the parents.

For the purposes of this case I must consider the domicile of the father, mother, and child to be that of a foreign country. And in disposing of this matter I must determine the rights of the parties, and must make my judgment conform to the law which governs these rights, subject to the general principles of our own law. I must ascertain what the law of that country is as applicable to the contested rights before me, and so far adopt that law as part of our own internal law in determining these rights, subject, as before stated, to our own general principles of jurisprudence.

That law is said to be that the mother is entitled to the custody of her infant children within the age of twelve years, and up to that age, when she is living separate from her husband, subject to the right of the Court to interfere with, and remove the children from her custody for cause assigned.

In addition to this, the order of the Court, before referred to, is relied upon as a specific adjudication of her right to the custody of the child. The order is *ex parte* on its face, and is not entitled to the same degree of respect as if it were made upon a hearing of both parties.

But even if the order had been made upon notice to the husband, and he had appeared and shewn cause to it, it can stand no higher than the final judgment of a Court; and by the statute 23 Vict., cap. 24, foreign judgments are not conclusive, but are only *prima facie* evidence of the right to recover being with the party in whose favour the judgment is. I must therefore permit an answer of any kind being made to this order which could have been made to it if cause had been duly shewn to it on an opportunity being afforded to the husband for that purpose in the country of domicile.

Is the law of the State of Michigan in favour of the mother on this application, she being

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separated from her husband, and the child being under twelve years of age? *Prima facie* it undoubtedly is, but it is not absolutely so. The Court there may make an order for the removal of the infant children from her for cause assigned, and of course for sufficient cause may decline to make the order granting her the custody of her children.

The causes relied on by the husband for resisting her right to the child are,

1st. The charge which he has preferred against her, and on which he founds his claim to a divorce. And

2nd. The renunciation she has made in his favour of the care and custody of the child.

As to the first ground, it is not on trial before me. I merely consider the facts stated to enable me to say whether, in my opinion, they are of that nature which justly raise a case for judicial trial, and in the face of which the mother can legally call upon the Court to order to her the custody of the child, by taking it from the custody of the father, who has provided for the safety and welfare of the child for some time past and so to give the mother the benefit of her suit in anticipation of the trial. I state this because I believe the same facts, if presented to the foreign tribunal, would induce it to consider the rights of the parties in that manner.

I do not believe the foreign Court would give the care of a child to a mother who was shewn to have been guilty of adultery, that being the cause of her separation from her husband. Nor do I believe the Court would grant its aid if there were a very strong probability of the truth of the charge being maintained on a full investigation.

The application of the mother then becomes one merely for judicial consideration, according to the circumstances of the case, and in that respect is to some extent not unlike our own law, excepting by our law the father is *prima facie*, in such a case, entitled to the custody of the children, and not the wife. Acting upon that rule, and without saying I have formed any opinion upon the charge against the wife either favourable or unfavourable to her, I yet feel myself so circumstanced that I cannot say I should take the child from its father's custody, where it is well and kindly treated, and put it in the charge of the mother, especially as the whole merits of the cause will be tried between the parties in the course of a very few weeks.

But I feel I should not dispose of the case without saying that the renunciation by the mother of the child is, in my opinion, a sufficient cause of itself for not interfering in her favour further than making an order for access to her child if that should be desired.

The account she gives of the manner and the cause of her executing that instrument does not very plainly agree with the letter which she wrote, and which accompanied the renunciation. That letter was not to be made use of in getting the child from Mr. Henry, who then had it. And yet it says she gives up her claim to the child, that she may be brought back to the husband's own care, who is to be both father and mother to her, and who is to teach her, if possible, to love and respect the name and memory of her mother.

The letter shews, in my opinion, that the husband was alone to have the child, and was to bring her up, and teach her, and that the mother was not to have, and did not expect to have the care, management, and instruction of the child. If the meaning were, as the wife now contends, there would be no force in the strong appeals which she makes in it to be remembered with love by her child.

I dispose of the case now upon grounds of law alone, and I feel obliged to direct that the child be allowed to remain in her father's care and custody. I leave the rights of the parties *in statu quo* until they can be disposed of by their own native tribunal; and in the meantime this application must be dismissed.

If I had decided the case according to our own law affecting our own local cases, by which the father is entitled to the custody of his children, and is not to be deprived of them unless a very strong case is established against him, I should not have had the least difficulty in discharging the application.

But I trust, even if the unfortunate litigation should result adversely to the mother—with respect to which I can form, and have attempted to form no opinion—that such arrangement may nevertheless be made that the mother will not be wholly denied all opportunities of access to her child. There is a law of nature which no other law is able to repress, and which it would be unreasonable, perhaps almost cruel to enforce in its full rigour, even if it should be proved that an unpardonable fault has been committed

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REG. EX REL. BOLE V. MCLEAN.

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by her. The result of the trial may be to acquit her of the charge, in which case the Court will unquestionably protect her rights.

I feel it to be my duty to dismiss the application.

REG. EX REL. BOLE V. MCLEAN.

Qualification of Councillor — Incumbrances — Estate of nominal value—Declaration.

Held, that notwithstanding the use of the word "estate," in the declaration of a candidate under the Consolidated Municipal Act, 1873, he is, nevertheless, qualified, if the rating of the value on the roll is sufficient in amount. No change has been made in the law that incumbrances are not to be considered in ascertaining the amount of qualification.

[April 15, 1875.—*Mr. Dalton.*]

The relator in his relation complained that the respondent was not duly elected Reeve of the village of Watford, in the county of Lambton, in that he was not duly and legally qualified, and had not a sufficient property qualification to hold the office.

The respondent claimed to qualify upon part of lot No. 2, on Main street, in said village. This, it appeared from the records at the Registry Office, was the southerly part, having a frontage of 44 feet on Main street, by a depth of 123 feet. The respondent was assessed for half this frontage, at the sum of \$700, and was not assessed for any other real estate. The other part of the 44 feet was assessed to one Rowland, as tenant of respondent at the sum of \$210. The part assessed to respondent was estimated in the affidavits at about the value of \$1,500, and the part assessed to Rowland, at about \$700, including buildings and machinery, in all about \$2,200. The land and premises owned by respondent was covered by a mortgage to one McKenzie, for \$2,000, and by another mortgage to one Smith, upon which about \$400 was unpaid. The affidavits filed by the respondent asserted that the whole property was worth about \$4,000.

S. Richards, Q. C., for the respondent, shewed cause.

J. K. Kerr, for the relator, *contra*.

MR. DALTON.—If compelled to decide as to the value of the property, I should hold that, after

deducting the incumbrances, the value remaining would not be sufficient to qualify respondent under the statute. Under these circumstances, I am compelled to decide whether a change has been made in the law by the Consolidated Municipal Act of 1873, so as to require the property qualification of a candidate at a municipal election to be the clear value of his estate after deducting the value of all liens and incumbrances with which it may be charged.

Under 29 & 30 Vict. ch. 51, the amount at which the land in which the estate existed was rated was the test, and that amount was not liable to deduction for any charges created upon that estate.

In the Consolidated Act of 1873, the clauses giving the qualification are in substance exactly the same, in all that affects the present point, as the corresponding clauses in 29 & 30 Vict. ch. 51; but in the form of declaration of qualification in 29 & 30 Vict. the elected officer was required to declare that he had such an estate as qualified him "to act in the office according to the true intent and meaning of the Municipal laws of Upper Canada."

In the Consolidated Act of 1873, the declaration required is substantially the same, so far as regards the present matter, except in this, that the officer is required to add that his estate at the time of his election, "was of the value of at least (specifying the value), over and above all charges, liens and incumbrances, affecting the same." It is argued as to this that the mention of all charges, liens, &c., in the declaration, shews the intention of the Legislature to take them into account, and conveys the meaning that the direction to specify the value, requires a value clear of all liens, not less in amount than the enacting the clauses provide for the qualification of the particular officer.

To this I cannot assent for reasons which I shall state below. But, first, it assumes two things which it would, in this case, be much safer to prove; 1. that it was the intention of the Legislature to deduct all liens in arriving at the qualification; and, 2. that because of that supposed intention, it must further have been intended that the blank for the amount of value should be filled up with the amount at least which the enacting clauses establish for the property qualification.

I cannot assent, because, as it seems to me, such a construction introduces great confusion and inconsistency, and is subversive of the whole

C. L. Cham.] REG. EX REL. BOLE V. MCLEAN.—WARCUP V. G. W. R. Co. [C. L. Cham.

theory and plan of the enacting clauses. These clauses deal with nothing but the rating of the land. They have no other test or mention of value. The declaration speaks of the value of a man's estate in the land, which is an utterly different thing. And, if the blank is to be filled up, as suggested, with the full qualification of the statute, it does not carry out the enacting clauses, but substitutes an entirely different test.

In the cases of *Reg. ex rel. Flater v. Van Velsor*, 5 Prac. R. 319, and *Reg. ex rel. Phillipbrick v. Smart*, ib., 323, it was held that, under 29 & 30 Vict., in estimating the qualification, such liens and incumbrances did not affect the rating, if that rating were in itself insufficient in amount. As the latter case was affirmed on appeal, I have a right to assume that its decision was correct, and without repeating the line of argument there adopted, I will say what is important here, that I think it established that the rating mentioned in the Act upon which the amount is based, is a rating of the land in which the estate exists, and not a rating of the party's estate. There is no such thing known to the law as the rating of a man's estate in land. All land is rated at its full fee simple value; but a man's estate in it which the statute recognizes as a qualification may be of the whole fee simple, or for life only, or for years—it may be for a single year. But the only value the qualifying clauses of the statute have reference to, is the rated value. One would suppose that if the Legislature meant to change this law—so much discussed and well known—that it would have been done directly by amending the qualifying clauses, and not left to distant inference from an alteration in the declaration the elected member had to make.

To exemplify what I mean, and make what I have to say as short as possible, I will put a case under the enacting clauses, and see how the declaration would affect it if it is to be construed as contended. Suppose a tenant for a year of land in a municipality rated at \$3,000, for which he pays monthly a rent—no matter how much, —the full value for the occupation. The first question is, under the enacting clauses, has such a tenant the property qualification for (say) an alderman of the municipality? He has. The words of the clauses are too plain to be denied. And he has it, not because his estate is of any value, but because it is a leasehold in land of the value of, and rated at \$3,000. Then, as to the declaration—the candidate is to declare the value of *his estate*, which is the value of his interest in the land, and that value of his inter-

est according to the contention, must be at least \$3,000, or he could not be an alderman. But it is plain from the statement that his interest is not worth more than a mere nominal sum.

I would observe that the word "estate" is once used in the enacting clauses, and once only, and used in the sense in which I understand it,—as describing the *interest* of the party in the land, and not the land; and this is its usual meaning. This instance would substantially apply to the whole class of leaseholders, and, in many instances which can be imagined, to life tenants; and, as both these classes are most clearly qualified by the enacting clauses, if the land in which their freehold or leasehold exists, be of the value, and rated of the proper amount, I must not adopt anybody's imagination in filling up a blank left in the declaration, to defeat the manifest intention of the Legislature, and disqualify these classes.

WARCUP V. GREAT WESTERN R. W. Co.

Local action—Where writ to be issued—Waiver of irregularity.

A summons to set aside a declaration (the venue being laid in the proper county) on the ground that the writ issued in a local action in the wrong county discharged, the defendant having duly appeared to the writ.

[February 2, 1875.—*Mr. Dalton.*]

Action for trespass committed in County of Halton. Writ issued from the office of Clerk of Process at Toronto, and appearance was duly entered thereto. The declaration laid the venue in Halton.

J. B. Read moved absolute summons to set aside declaration and writ on the ground that the cause of action being local, the writ should have issued from the office of the deputy clerk of the Crown in Halton.

Beatty, Q. C., contra.

MR. DALTON discharged the summons on the ground that, although such issue of writ was irregular, the irregularity was waived by entry of appearance, and the declaration laid venue in the proper county. See C. L. P. Act, sec. 8, and *Moran v. Palmer*, 13 U. C. C. P. 450.

Summons discharged.

C. L. Cham.] WALKER v. FAIRBAIRN, &c.—TECUMSETH SALT CO. v. PLATT. [C. L. Cham.

WALKER v. FAIRBAIRN.

Examination of judgment debtor—Ejectment—Costs.

An order will not be made under Con. Stat. U. C., cap. 24, sec. 41, as amended by 27, 28 Vic., cap. 25, for the examination of a defendant in ejectment against whom there has been a judgment for costs.

[May 26, June 15, 1875.—*Mr. Dalton.*]

A summons was obtained, calling upon the defendant in an action of ejectment, against whom judgment had been signed for costs, to shew cause why he should not be examined under Con. Stat. U. C., cap. 24, sec. 41. The summons was served personally on defendant, and on its return (no cause being shewn) it was moved absolute.

Caswell. The order should be made on the authority of *Lovell v. Gibson*, 6 Prac. R. 132. [MR. DALTON.—The case of *Herr v. Douglass*, 4 Prac. R. 124, is an authority against such an order.] That case is different. The costs there being payable to the defendant; here the costs are given to the plaintiff, with his judgment for possession.

MR. DALTON, after taking time to consider, refused the order on the authority of *Herr v. Douglass*, which he thought governed this case, rather than *Lovell v. Gibson*.

Summons discharged.

HOOTALING ET AL. v. CUTTLE ET AL.

R. G. 100—Declaring against prisoner.

R. G. 100 is imperative that a prisoner arrested and in close custody must be declared against before the end of the term after his arrest, and it is no excuse that a summons was pending during the last week of the term to set aside the *capias* and arrest.

[September 22, 1875.—*Galt, J.*]

This was a summons calling upon the plaintiff to shew cause why the defendant Cuttle should not be absolutely discharged out of custody under the writ of *capias ad respondendum* issued in this cause on entering a common appearance, on the ground that the said defendant, being a prisoner in close custody under the said writ of *capias*, and having been arrested under said writ before last Trinity Term, no declaration in this cause was filed and served on the defendant be-

fore the end of the term after his arrest, and no declaration has yet been filed against the defendant, &c.

It appeared that the defendant Cuttle, having been arrested under a writ of *ca. re.* before the commencement of last Trinity Term, obtained a summons on August 26th last, during the term, calling on the plaintiff to shew cause why the copy and service of the writ of *capias* issued herein, and the arrest of the said defendant Cuttle, should not be set aside for irregularity, with costs, on the ground set forth in the summons. This summons was discharged on the 4th September, being the last day of term.

J. K. Kerr shewed cause, and contended that as the defendant's application was under consideration, the plaintiff was not in a position to file and serve a declaration.

Osler, contra.

GALT, J.—The Rule of Court No. 100 is imperative upon the plaintiff to declare against the defendant before the end of the next term after the arrest, and unless I was prepared to differ from the decision in *Glennie v. Ross*, 10 U. C. L. J. 105, this summons must be made absolute. There is a provision in Rule 100 for obtaining further time to declare, of which, perhaps, the plaintiffs might have availed themselves, but they have not done so. This summons will therefore be made absolute.

Order accordingly.

TECUMSETH SALT COMPANY v. PLATT.

C. L. P. Act, secs. 109, 129—34 Vict. cap. 12, sec. 4—Jurisdiction of County Judge—Imposing terms.

Held, that a County Judge has only power under above Acts to impose terms when the party applies for an indulgence, and does not give power to make any substantive or unconditional order as to terms.

[September 23, 1875.—*Galt, J.*]

This was a summons calling on the plaintiff to shew cause why so much of an order, made by the Junior Judge of the County of Huron, as orders the defendant to take short notice of trial and assessment, and that service of the issue book with notice of trial shall be sufficient, and also that plaintiff, if so advised, may try

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TECUMSETH SALT CO. V. PLATT.—IN RE THOMAS.

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the issues in fact first—should not be rescinded on the ground that the said Judge had no power or jurisdiction to grant a summons for any purpose except for leave to plead and demur, or to impose any terms in such order.

The summons originally made by the learned Judge was as follows : “Upon reading the affidavit of the plaintiff’s attorney, and the papers thereto annexed, let the defendant, his attorney or agent, &c., shew cause why the plaintiffs should not have leave to take issue on the pleas of the defendant, and why the plaintiffs should not also, at the same time, have leave to demur to the defendant’s second plea, and why such other order should not be made as to me may seem just.” Upon the return of this summons the following order was made : “Upon reading the summons granted by me in this cause, and upon hearing both parties, I do order that the plaintiffs have leave to take issue on the defendant’s pleas, and at the same time to demur to the defendant’s second plea, the matters mentioned in the annexed abstract; that defendant take short notice of trial and assessment, and that service of issue book, and notice of trial be sufficient ; also, that plaintiff, if so advised, may try the issues in fact first.”

W. S. Smith for plaintiff.

Osler for defendant.

GALT, J.—It is to be observed that the original summons was taken out by the plaintiff under sec. 4 of 34 Vict., cap. 12, amending sec. 109 of the Common Law Procedure Act. By sec. 129 of the C. L. P. Act : “In suits in either of the Superior Courts the Judge or acting Judge of the County Court for the county in which the suit has been brought, or the venue laid, may, upon the application of the plaintiff or defendant in such suit, grant summonses and orders for time to declare, plead, reply or rejoin, and for particulars of demand, or of set off, &c., &c., and such Judge of the County Court may hear and determine such applications, and grant such summonses, impose such terms, and make such orders as might be granted, made and imposed in the like cases by a Judge of one of the superior courts sitting in Chambers.”

It appears to me that the power to impose terms arises when the party, plaintiff or defendant, applies to the Judge for an indulgence, and not when, as in the present case, the plaintiff applies for leave to take issue and demur to the pleas of defendant. The defendant was not before the

Judge on any summons of his own, and no power was given by the above section to a County Court Judge to make an unconditional order on the defendant to take short notice of trial on the application of the plaintiff.

The concluding part of the order is also in contravention of the rule of Michaelmas Term, 29 Vict., which is as follows : “It is ordered that in all cases where leave is given to raise an issue or issues of law, together with an issue or issues of fact to any declaration or subsequent pleading, the issue or issues of law shall be determined before the trial of the issue or issues of fact, unless otherwise expressly ordered by the Court or Judge in the rule or order permitting such issue or issues to be raised.” By the order of the learned Judge this course has not been followed, and consequently the plaintiff is not in a position to proceed to trial until the issues in law are disposed of. The order is distinct, that the Judge must decide the question himself, and cannot delegate a choice to the plaintiff.

The summons will be absolute to set aside the order, except as to the leave to plead and demur.

Order accordingly.

IN RE THOMAS, an Insolvent. W. F. McMaster (Contestant), Appellant; and Eliza Thomas (Claimant), Respondent.

Insolvency—Application in appeal from County Judge.

Under the Insolvent Act of 1869, secs. 83 and 84, it is not enough that appellant serve notice of appeal within the five days limited by the Act, and subsequently file the appeal bond ; the application in appeal must be served upon respondent, and security for costs must also be given within five days from the day on which the order or judgment is rendered, otherwise the appeal will not be allowed.

[September 1, 1875.—*Galt, J.*]

This was a rule calling upon the appellant to shew cause why the notice of appeal herein and all subsequent proceedings should not be set aside, or the petition on appeal should not be dismissed, or why the appeal set down to be argued herein should not be struck out, and the said appeal dismissed, and the notice of setting the same down and all other proceedings set aside, on the ground that the appellant did not give the security required under the statute to be given within the time limited by

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IN RE THOMAS.—OAKLEY V. TORONTO, G. & B. R. W. CO.

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the said statute ; and that the appellant having neglected to give the said security within five days from the day on which the judgment and order appealed from were made and delivered, the said appeal cannot be entertained or permitted, and on the ground that the said appeal is too late, and the said judgment and order have been confirmed by time.

The facts appeared to be, that on the 5th of February, 1875, the Judge of the County Court of Victoria made an order that the award of the assignee in this case should be confirmed, and the appeal therefrom dismissed ; that the solicitor of the contestant resided in Toronto, and that he did not receive notice of such order having been made until the 8th ; that he forthwith prepared a notice of appeal, and a bond for security for costs ; that this notice was served on the solicitor of the claimant on the 10th of February ; that by said notice the claimant was informed that an application would be made to the Judge for allowance of such appeal, and for allowance of the bond filed on the 15th February, 1875 ; that the said bond was approved by the Judge on the 18th February, subject to the objection, that it was not given within five days from the day on which the Judge had made his order confirming the award of the assignee.

J. H. Macdonald shewed cause.

J. K. Kerr supported the rule.

GALT, J.—By the 84th sec. of the Insolvent Act of 1869, an appeal is allowed from any final order or judgment of the Judge ; but the 84th sec. enacts : “Such appeal shall not be permitted unless within five days from the day on which the order or judgment is rendered, the party desiring to appeal causes to be served upon the opposite party and upon the assignee an application in appeal, setting forth the proceeding before the Judge, and his decision thereon, and praying for its revision, with a notice of the day on which such application is to be presented, and also within the said period of five days causes security to be given before the Judge by two sufficient sureties, that he will duly prosecute such appeal, and pay all costs incurred by reason thereof by the respondent.”

It is not possible to use language more distinct and imperative than that contained in the foregoing section, but Mr. Macdonald urged that notice of appeal having been given in time, and the bond having been executed in time, that the bond might be allowed after the five days ; and

in support of this contention he relied on the case of *Re Owens*, 12 Grant 446. It is to be observed that the words of the statute under which that case was decided, the Act of 1864, differ from those of the 84th sec., the corresponding provision in that Act (being the 3rd sub-sec. of 7th sec.), is : “Such appeal shall not be permitted unless the party desiring to appeal applies for the allowance of the appeal, *with notice to the opposite party*, within five days.” This provision respecting notice is not found in the 84th sec., and it was in consequence of such a stipulation that the learned Vice Chancellor decided the case of *Re Owens*. He held that because it would be impossible to comply with sec. 11, sub-sec. 9, as respects notice, if the party resided 120 miles from the seat of the Court, it was necessary to hold that, according to the intention of the Act, if the service was within the time limited, the application might be for a day subsequent. This decision may very probably have led to the change, and to the omission of the notice.

The words appear to me to be too clear to allow the Court or a Judge any discretion. The Legislature has said that no appeal shall be permitted, unless the party desiring to appeal shall, within the period of five days from the day on which the judgment was rendered, cause security to be given before the Judge. This has not been done, although Mr. Macdonald appears to have used every exertion in his power ; and consequently this rule will be absolute to strike out the appeal. Costs to be paid out of the estate.

Rule absolute.

OAKLEY V. TORONTO, GREY AND BRUCE
R. W. CO.

A. J. Act, 1873, sec. 24—*Examination—“Officer” of Railway Co.*

[January 12, 1874.—*Mr. Dalton.*]

The plaintiff applied for an order to examine the chief engineer of the defendant.

The application was opposed on the ground that the engineer was not an officer of the company within the meaning of sec. 24 of the Administration of Justice Act.

MR. DALTON held that he was, and made the order.

C. L. Cham.] CANADA P. B. SOCIETY v. FOREST.—LLOYD v. HENDERSON, &c. [C. L. Cham.

CANADA PERMANENT BUILDING SOCIETY v.
FOREST.

A. J. Act, 1873, sec. 24—Party to interpleader issue may be examined.

[January 14, 1874.—*Mr. Dalton.*]

An application to examine the defendant in an interpleader issue was opposed on the ground that such a proceeding was not "an action at law."

MR. DALTON held that an interpleader issue was within the meaning of the above words of the Act, and made the order.

REG. EX REL. O'REILLY v. CHARLTON.

A. J. Act, 1873, sec. 50—Amendment—Quo warranto proceeding.

[February 24, 1874.—*Mr. Dalton.*]

The relator in his relation failed to state that he was a candidate or a voter as required by 36 Vict. cap. 48, sec. 131, but the fact that he was so, appeared in one of the affidavits.

On this objection being taken,

MR. DALTON said that as the fact of the relator being a voter was before the Court, he would allow an amendment of the relation under sec. 50 of the Administration of Justice Act 1873.*

LLOYD v. HENDERSON.

A. J. Act, 1873, sec. 29—Examination—Affidavit.

[January 19, 1875.—*Mr. Dalton.*]

The affidavit in support of an application to examine defendant under sec. 29 of the Administration of Justice Act 1873, was made by the partner of plaintiff's attorney. The objection was taken to the affidavit in that it was not made by the plaintiff or by his "attorney or agent."

MR. DALTON.—I think the affidavit is sufficient. I have already held in *Hamilton v. Great Western R. W. Co.* that an affidavit made by a managing clerk, comes within the meaning of the words in the section.

GILMOUR v. STRICKLAND.

Change of venue—Preponderance of convenience.

The venue will not be changed, when there is no great preponderance of convenience, merely on the ground that the cause of action arose in the county to which it is sought to change the venue. The place where the cause of action arose is merely a circumstance in the discussion, and of no importance as compared with the preponderance of convenience.

[October 6, 1875.—*Mr. Dalton and Hagarty, C.J.*]

The defendant sought to change the venue from the county of Hastings to that of Peterborough.

The action was in replevin for a quantity of timber alleged to have been taken from the plaintiff's limits in the county of Peterborough.

Osler shewed cause, and read an affidavit made by plaintiff's attorney, stating that plaintiff intended calling twelve witnesses, all of whom resided in or near the county of Hastings; that they had no witnesses resident in Peterborough, and that four or five of these would be required as witnesses in two other cases at the assizes in Belleville (the county town of Hastings), in which the plaintiff was concerned.

J. K. Kerr supported the summons. The cause of action arose in Peterborough. Defendants' affidavit showed, moreover, that both defendants resided there, and that they intended calling fourteen witnesses, who also resided there.

MR. DALTON held that there was not any such preponderance of convenience shewn in favour of a trial at Peterborough as should induce him to change the venue which the plaintiff had selected, and he accordingly discharged the summons.

From this decision defendants appealed, and the appeal was heard before Hagarty, C.J. C.P.

*These four cases were noted at the time in the *Law Journal*, but by accident were omitted from the Reports.—REP.

C. L. Cham.] GILMOUR v. STRICKLAND.—FAIR v. CANADIAN M. F. INS. CO. [C. L. Cham.

J. K. Kerr, for appellant, cited *Harper v. Smith*, 8 C. L. J. N. S., 171, in which the venue was changed from Haldimand to Wentworth on defendants' affidavit stating that the cause of action arose in Wentworth, and that nearly all the witnesses to be examined resided there. This decision was based on *Levy et al. v. Rice*, L. R. 5 C. P. 119, where Willes, J., ordered the venue to be changed, on the ground that, other matters being equal, the place where the contract was made, the breach took place, and the defendant resided, should be the place of trial.

Osler, contra, contended that there was no preponderance of convenience as far as regards the witnesses, for the numbers were almost equal, and it was the plaintiff's right to lay the venue where he pleased. He cited *Church v. Barnett*, 40 L. J., N. S. 138, where Willes, J., in delivering his judgment, said: "The plaintiff has a right generally to lay his venue where he thinks proper; and, when he has not exercised a capricious choice, it is to be considered that he has exercised a right, and it lies on the defendant to shew that the preponderance of convenience is in favour of trying the case where the cause of action arose, rather than at the place where the plaintiff has laid the venue. Defendants have not done so here;" and the rule was refused.

HAGARTY, C. J. C. P., following the rule as laid down in *Church v. Barnett*, dismissed the appeal; but at the same time he expressed his opinion that the question was one which could with propriety be brought before the full Court, so that some clear and definite rule might, if possible, be adopted.

*Appeal dismissed.**

FAIR v. CANADIAN MUTUAL FIRE INSURANCE COMPANY.

Declaration on policy of insurance.

Held, that in an action on a policy of insurance it is not incorrect to set out all the conditions which, together with the body of the policy, form the contract between the parties.

Semble, that a declaration which did not set out such conditions would be bad.

[October 1, 1875.—*Mr. Dalton.*]

This was a summons to strike out that portion of the declaration which sets forth certain conditions endorsed upon the back of a policy of insurance as unnecessary.

Bethune shewed cause. The conditions in question qualify the general wording of the policy, and are a material portion of the whole contract, and must be set out: see *London and North Western Railway v. Glyn*, 1 E. & E. 652; *Marsden v. City Assurance Co.*, L. R. 1 C. P. 232; 2 Ch. Pl. 382.

Meyers, (Beaty, Chadwick, & Lash) contra. The cases cited are prior to the passing of the C. L. P. Act, 1852, which was intended to shorten pleadings; and much of the matter contained in plaintiff's declaration is superfluous.

MR DALTON.—The declaration is correctly drawn, and it is proper that all the conditions of the policy which, together with the policy, form the contract between the parties, should be set out, followed by a general allegation of performance.

Summons discharged with costs

* In a subsequent case which came before Mr. DALTON (*Gwatkin v. Evans*), the grounds upon which the venue was sought to be changed were very similar to those in *Gilmour v. Strickland*, the point as to the cause of action being mainly relied upon by the defendant in his application. In giving his decision Mr. DALTON said, "It appears that the number of witnesses to be called by either party is about equal. Prior to the Common Law Procedure Act, the place in which the cause of action arose

was a very material matter in deciding upon a change of venue; but that Act specially extended the facilities of suitors by its provisions with respect to transitory actions. So that now, although the place where the cause of action arose is a circumstance in these applications, it is merely a circumstance, and if allowed to have much weight would have the effect of making many actions local which the Act intended to be transitory." REP.

Chy. Cham.]

PRICE V. BAILEY.

[Chy. Cham.

CHANCERY CHAMBERS.

PRICE V. BAILEY.

Commission to examine a party—Neglect to attend on return of a motion.

A commission for the examination of a party to the cause on his own application will not be granted unless it is clearly shewn that the commission would under the circumstances be conducive to the ends of justice.

As a general rule, where a person having received notice of a motion does not attend upon it, the order made thereon should not be interfered with.

But where a party who had so neglected to attend, came in twenty-four hours to re-open the matter, it was considered that he was entitled to be heard to shew that the order made was one which it was not proper to make.

[May 10, 1875.—*Blake, V. C., on appeal from Referee.*]

The bill in this suit was filed by the assignee in insolvency of Mary Ann Bailey against William John Bailey, the husband of the insolvent, and her agent in her business. It alleged that certain lands purchased by the defendant in his own name had been purchased with the money and goods of the insolvent, and prayed that the defendant might be declared a trustee of the lands for the plaintiff, and that the lands might be sold for the benefit of the creditors of the insolvent.

The defendant, pending an examination in the insolvency matter, left the country with his wife, taking with him the books of account of his wife's business, and he was, at the time of this motion, residing in Chicago. This motion was made on the application of defendant for an order for the issue of a commission to take his own evidence and that of his wife in this suit.

On the return of the motion no one appeared for the plaintiff, and the order was made. The next day a motion was made by the plaintiff to re-open the matter. No excuse was offered for the non-attendance of the plaintiff on the previous day.

MR. HOLMESTED considered that the reason for not appearing on the former motion should be shewn before the order would be set aside, and he therefore dismissed the motion.

The plaintiff appealed.

W. A. Foster, for the appeal.

W. G. P. Cassels, for defendant.

BLAKE, V. C.—I do not think the Court is compelled in every case to grant a commission for the examination of a party to the cause on his own application. I think an order should not be granted, unless it be clearly shewn that the commission would, under the circumstances, be conducive to the ends of justice. This is a case in which the witnesses whom it is proposed to examine should if possible be produced before the Court. I think the Referee, under the circumstances, erred in allowing the order to stand as against the defendant. It is very questionable whether, under the circumstances, it should not be discharged as far as the wife is concerned. It is, however, said that the defendant could have answered the affidavits of the plaintiff, and shewn that the defendant and witnesses could not possibly attend, and assigned reasons for their not doing so. There is, in the mean time, no opportunity for producing this testimony. If possible, the defendant and his witnesses should attend at the examination at London. This remark applies to the defendant with peculiar force, as he appears to have left the country pending his examination in the insolvency proceedings, and to have taken the books of account in the matter with him. If the defendant be present, and on his examination convinces the Court that his wife and the other witnesses cannot be present, the Court may then take his evidence and accept the commission so far as the other witnesses are concerned, or may, thinking the absence of the other witnesses a scheme, decide not to take the examination of any of the witnesses unless they appear personally before the Court. I do not see what order can at present be made except one directing the matter to stand over before the Judge at the hearing, when he can make such order as the circumstances of the case, as they present themselves, may warrant. As a general rule, when a person having received notice of a motion does not attend upon it, the order made should not be

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interfered with, but I think this is an exceptional case, and one in which a party coming within twenty-four hours should have been heard to shew that the order was one which should not have been granted. I do not think the delay for so short a time requires that an order should stand which, so far as the defendant is concerned, should not, on the evidence now before me have been granted, and the effect of which may be to prevent the plaintiff obtaining a decree to which he may be entitled : see Con. Stat. U. C., p. 405 ; Taylor on Evidence, 475 ; *Castelli v. Groome*, 21 L. J. N. S. Q. B. 308. The question of the costs of this motion can be disposed of at the same time that the motion itself is determined.

Appeal allowed.

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Amendment—36 Vict. c. 8, sec. 50—Staying sale under decree.

The mortgagor in a suit for sale having become insolvent after decree but before the day appointed for redemption, the plaintiff, without reviving the suit, took out a final order for sale, and the proceedings for having the sale were completed.

On the motion of the assignee in insolvency to make him a party, and to set aside the proceedings for sale as irregular, and to stay the sale, an order was made adding this assignee as a party, pursuant to the powers of amendment conferred by sec. 50 of the Administration of Justice Act, 1873, but without staying the sale, as it did not appear that any injury would result from its being allowed to proceed.

Observations on the policy of the Court as to staying sales under decrees.

[June 13, 1875.—*Blake, V. C.*, on appeal from *Referee.*]

The plaintiff in this suit filed a bill for foreclosure ; a subsequent incumbrance obtained a decree for sale, but before the day appointed for redemption the defendant Johnston, the mortgagor, became insolvent. The plaintiff, without reviving the suit or making the assignee a party proceeded with the suit, took a final order for sale, and proceeded to settle an advertisement for the sale of the mortgaged property.

The assignee of the insolvent mortgagor now applied on petition to set aside these proceedings, on the ground that they were irregular and void as against him, and he asked to have the

advertisement referred back to the Master, and the sale in the meantime stayed.

J. C. Hamilton, for the assignee.

J. D. Armour, for plaintiffs and other defendants.

Mr. HOLMESTED.—I think the petitioner is entitled to succeed on the application.

The effect of the bankruptcy of a defendant *pendente lite* on the proceedings in a cause is thus stated in Daniell's Chancery Practice, 4th ed., p. 156 : "Where a defendant becomes bankrupt after the commencement of the suit, the bankruptcy is no abatement, and the plaintiff has his choice either to dismiss the bill and go in under the bankruptcy, or to go on with the suit, making the assignees parties." See *Monteith v. Taylor*, 9 Ves. 615 ; Smith's Practice, p. 793 ; Calver on Parties, p. 112. In *Jones v. Binns*, 10 Jur. N. S. 119 ; and 33 Beav. 362, I also find that a plea of the bankruptcy of the defendants *pendente lite* as a bar to the further prosecution of the suit against the insolvents, was allowed. It was contended, however, that the assignment in this case having taken place after the decree, rendered it unnecessary to add the assignee as a party. The case of *Wood v. Sur*, 19 Beav. 551, however, I think shows that that position is untenable. In that case the plaintiff, a mortgagor, filed his bill for redemption, and after decree, but before the time appointed for redemption, he became bankrupt. The defendant proceeded without taking any notice of the bankruptcy, and obtained an order dismissing the bill, which of course was equivalent to a decree of foreclosure. The regularity of this proceeding subsequently came under the consideration of the late Master of the Rolls, Lord Romilly, and although he held that the third party would have no right to object to the proceedings on the ground of the want of notice to the assignee, yet as against the assignee himself they would be wholly inoperative. He said, "there can be no question but that the suit was defective by reason of no notice having been taken of the insolvency. The proceedings having gone on exactly as if no insolvency had taken place, the subsequent proceedings would, in my opinion, be wholly inoperative against the assignee in insolvency, and if he had thought fit to contest the validity of the decree of foreclosure against Davis, it could not be held to be binding on such assignee." It is true this expression of opinion was not necessary for the decision of that case, but taking it in connection

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with the other cases referred to, and no authority being produced in support of the plaintiff's contention, I think I should be wrong if I came to any other conclusion than that here the assignee should have been made a party. An argument was addressed to me as to the sufficiency of the allegations in the affidavit as to the petitioner's title, and it was contended that as the affidavits did not show that the mortgagor was a trader, it did not sufficiently appear that the petitioner stood in the position of an assignee under the Insolvent Act, but with regard to that objection, I may say that I think the title of the petitioner is sufficiently shown for the purpose of this application. It is, of course, desirable that on applications of this kind the statements in petitions and affidavits should not be loose and indefinite, but I am not prepared to say that the respondent can take exception to allegations in affidavits and petitions on interlocutory proceedings of this kind as though he were arguing a demurrer to a pleading. Here it is alleged in the affidavit that the petitioner was appointed assignee of the mortgagor pursuant to the provisions of the Insolvent Act of 1869, and still is assignee, and there is no affidavit casting any doubt or suspicion on that statement, and I therefore think it sufficiently shows the petitioner's title, and if I had any doubt on the point I should think it a proper case to allow the petitioner to file a further affidavit.

It is unnecessary, taking the view I do, to go into the question raised as to the form of the advertisement, and the manner in which it is proposed to sell the mortgaged property. The petitioner, in my opinion, was entitled to notice of the settlement of the advertisement, and he had a right to urge his views as to the mode of sale before the Master, and he has had no opportunity of doing so.

As the petitioner is willing to be added as a party by the order to be made on the application, and to be bound by the final order of sale, the order can go in that form. The proceedings subsequent to the final order of sale, so far the petitioner is concerned, must be set aside; the sale must be stayed, and the advertisement referred back to the Master to be resettled upon notice to the petitioner.

Section 42 of the Insolvent Act of 1869 authorizes an assignee to intervene in suits commenced against the bankrupt before his bankruptcy, and on his application he may have his own name inserted in place of that of the insolvent, but I do not think there is anything in

that section which would make valid, as against the assignee, proceedings which have been taken in his absence, even though he had not availed himself of the power given him by that section. According to the practice of the Court it was essential to the validity of the plaintiff's proceedings, as against the assignee, that he should be brought before the Court, and the plaintiff was not, in my opinion, justified in waiting for the assignee to move under section 42.

As the plaintiff had notice of the bankruptcy of the mortgagor, I think he should pay the costs of this application, and also all costs occasioned by his not making the petitioner a party in the ordinary way at the proper time.

The plaintiff appealed.

BLAKE, V. C.—Under sec. 42 of the Insolvent Act of 1869 the assignee "may intervene and represent the insolvent in all suits or proceedings by or against him, which are pending at the time of his appointment, and on his application may have his name inserted therein, in the place of that of the insolvent." Under section 50 of the Administration of Justice Act of 1873, "at any time during the progress of any action, suit, or other proceeding at law or in equity, the Court or a Judge may, upon the application of any of the parties, and whether the necessity for the required amendment shall or shall not be occasioned by the defect, error, act, default, or neglect of the party applying to amend, or without any such application, make all such amendments as may seem necessary for advancement of justice, &c." The full power hereby given to the Canadian Courts is not to be found in any enactments concerning the English Courts, and it seems to me that in this country the Judges are left to work out, in any suit which becomes defective, the means whereby substantial justice may be had between the parties. No doubt here, on the application of any party to the suit, or of the official assignee, an order should be made adding the assignee as a party; if for no other reason, as a matter of caution, so as to satisfy the scruples of a purchaser at the sale, whose solicitor might raise the question of the abatement of the suit. The official assignee is therefore entitled, on his application, to an order adding him as a party defendant.

There is the further question, whether, being added, it is proper to make an order staying the sale of the premises in question, which has been duly advertised for to-morrow.

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In many cases in this Court it has been laid down that its sales are not lightly to be interfered with. The reason that the properties disposed of here have realised such good prices, as compared with sales made by the Sheriff, is, that there has been so little doubt connected with them, in regard either to title or description; and no uncertainty as to the sale taking place on the day fixed by the Court. It has been by a diligent observance of these rules that the sacrifice of the suitor's property which takes place to so great an extent in common law sales, has been prevented in this Court. Only in an extreme case should a sale be postponed. Where an application is made, some time before the day appointed for the auction, so that a postponement can be had before bidders have arranged to attend and to become purchasers, then it may not, at times, be unreasonable to allow an adjournment, as no injury need thereby be done; but where the application is made but a few days before the time appointed for the sale, then it is out of the question to grant a postponement unless there be some fraud or evil practice, or some omission which will plainly cause damage to parties interested. Here by a postponement the proposed sale would be damped, and general discredit will be cast upon all the sales of the Court. The sale in question is to take place tomorrow; already those who intend to purchase have made their arrangements for so doing. No postponement can now take place, except in the auction room. The annoyance caused by dispersing in this manner the intending purchasers will put persons out of the whim or intention of purchasing, and deter them from attending at any future sale of the kind. There was nothing to prevent the assignee intervening in the suit in due time to enable him to see to the settlement of the advertisement. If he chooses to delay doing so until the last moment, I cannot visit the result of his neglect on those interested so largely in the estate as are those who oppose the postponement of the sale.

On the examination of the mortgagor the advertisement was settled in the presence of all parties. There seems to be very good reasons for putting up the property in the manner the Master has adopted, and from which settlement there was no dissent. I am not convinced that it is, notwithstanding the views of those gentlemen who have made affidavits in favour of the contention of the assignee, under all the circumstances the best means of disposing of the premises. As a positive injury will arise from the postponement of this sale, and I cannot say that

any compensating advantage will follow therefrom, I must refuse the adjournment.

Those insisting on the sale assented to its postponement, if only their debts were secured, thereby shewing that all they desired was, not the sacrifice of the property, but such a dealing with it as would ensure the payment of the amount due them.

I think the costs of this application, and of that before the Referee, should be costs in the cause to all the parties.

Appeal allowed.

RE PHELAN.

Sale of infants' estate—C. S. U. C. cap. 12, sec. 50.

An application to confirm a sale of an infant's estate was refused where it was not shewn as required by C. S. U. C., cap. 12, sec. 50, that the sale was necessary for the maintenance of the infant, or that by reason of the property being exposed to waste or dilapidation, or to depreciation from any other cause, the interests of the infant would be promoted by a sale and where also it appeared that the proceeds of the sale would not produce as large a sum as the property could be rented for, if placed in a proper state of repair.

[June 23, and September 30, 1875.—*Referee*]

Application to confirm a sale of infant's estate.

C. A. Sadlier for the petitioner.

MR. HOLMESTED.—The property in question is a water lot, with a boat-house erected thereon. The property has been rented until recently for \$200 per annum. The tenant, however, has terminated the lease, partly, as I gather from his evidence, because he has bought another property near by, and partly because the property in question had got out of repair. The guardian of the infant, under these circumstances, has entered into a conditional contract with Mr. Brown, the Commodore of the Burlington Bay Yacht Club, for the sale to him of the property, for the use of the club, for \$1800,—\$600 to be paid down, when the title has been approved, and the vendors are in a position to make a conveyance, and the balance in three equal annual instalments, with interest at 8 per cent. per annum, secured by mortgage on the premises.

It appears from the evidence of Bastien, the late tenant, that \$300 is all that would be re-

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RE PHELAN.—BURKE V. BLAKE

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quired to put the boat-house in proper repair. With this expenditure upon it, I judge it could be rented for at least \$200, the same rent which has, until recently, been obtained for it. The affidavits of Mr. Brown, the proposed vendee, and Mr. Saillier, the petitioner's solicitor, state that a loan of \$300 could have been obtained prior to the conditional sale to Brown upon the security of the lot. They do not say that the lesser sum of \$300, which is all that is required, could not have been obtained. On the contrary, from their affidavit, I should rather infer that it could have been so obtained, especially as the money was to be laid out in improving the property.

It is not alleged in the petition, nor does it appear by the evidence that the sale is necessary for the maintenance of the infant, nor that the sale is necessary by reason of the property being exposed to waste and delapidation, or to depreciation from any other cause; and these are the only grounds upon which the statute authorizes a sale; and even if I could properly take into account the question whether the sale would, irrespective of those considerations, be beneficial to the infant, I do not think that such a case is made out.

The property has been yielding, heretofore, \$200 a year. By an expenditure of \$300 upon it, it would seem it might still be made to yield that sum; and deducting interest on \$300, at 8 per cent., would still leave a net income of \$176. On the other hand, the income derivable from the \$1800, supposing it all to be invested at 8 per cent., would only be \$144. Thus a clear loss of \$32 per annum of income would be the result of the transaction. Under these circumstances, I think I should not approve of the proposed sale. If the petitioner, however, is dissatisfied with the conclusion at which I have arrived, I will refer the matter to a Judge.

I may add that the allegation in the petition, that the petitioner was the sole heiress of her father, appears to be incorrect, he having left another daughter, who has since died, and as to whose share the mother would be entitled for life, the petitioner being merely entitled to the remainder in fee.

Order refused.

BURKE V. BLAKE.

Evidence of mercantile custom.

To incorporate mercantile usages with the terms of a contract, or to prove that they form the basis of it, they must be such as attach universally to the subject matter of the contract in the neighbourhood or place where it was made.

If a local custom or usage of a particular place, or class of persons, be relied on, it must be shewn that the parties knew the custom, as it is not binding on those who are ignorant of it.

The evidence of the usage must be "clear, cogent, and irresistible."

[August 30, 1875.—*Proudfoot, V. C.*, on appeal from *Referee.*]

This was a motion made on behalf of Messrs. Thorne, Parsons & Co., for payment to them of an allowance for shrinkage on leather purchased by them from the Receiver in this suit.

H. Thorne, for the applicant, read affidavits, stating that it was customary in sales by tanners to allow an abatement for shrinkage, and that the contract in this case was subject to that custom, the leather to be weighed at the applicant's warehouse, when dry, to ascertain the shrinkage.

W. A. Foster, contra, read affidavits denying the existence of the custom, and stating that the contract in this case was for hides of the weight ascertained at the tannery, where an allowance for the greenness of the leather had been made at the time of sale, which was intended to cover all shrinkage.

MR. HOLMESTED.—On the ground that the custom was not established, and the terms of the contract as to shrinkage not satisfactorily proved, dismissed the application without prejudice to another being made upon further material.

The applicants appealed.

PROUDFOOT, V. C..—In this appeal the evidence of custom in respect to allowance for shrinkage on sales of leather to be made at time of delivery is too uncertain and contradictory to enable me to act upon it. To incorporate mercantile usages or customs with the terms of a contract, or to prove that they form the basis of it, they must be such as attach universally to the subject matter of the contract in the neighbourhood or place where it was made. Or, as expressed in some cases, they must be general and unvarying incidents which

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a uniform usage would annex. If a local custom or usage of a particular place, or class of persons, be relied on, it must be shewn that the parties knew the custom, as it is not binding on those who were ignorant of it. And the evidence of the usage, it is said, must be "clear, cogent, and irresistible." Add. on Contracts, 7th ed., p. 185, and cases there cited; *Kirchner v. Venus*, 12 Moo. P. C. 361, 399; *Lewis v. Marshall*, 7 Man. & Gr. 745.

The custom alleged in this case is one attaching to sales by tanners, to a particular class of persons, or a specific trade. The evidence in support of it is very unsatisfactory. The custom is affirmed by Abbott, Hudson, Howe, Blake, and Parsons. It is denied by Burke, Andrews, Fullmer, and Wooton. And it is asserted by Wooton that sales were never made at this tannery by any other weight than that ascertained at the time of sale, and that sales were made to these very petitioners in that way without any claim by them of such a custom. These are charges capable of being denied if untrue; but I find no denial of them, although Charles Parsons has made more than one affidavit. It should be noticed, also, that Blake, who swears to such a custom, was one of the partners in the tannery, and if Wooton's statement was untrue, I would have expected him to contradict it. But it stands uncontradicted that no sales were ever made on such a custom at this tannery. It is also uncontradicted that Blake told both Burke and Wooton that the petitioners, in making this claim, were trying to cheat him.

The evidence, I think, falls very far short of the requirements of Tindal, C.J., that it should be "clear, cogent, and irresistible." It does not satisfy me that any such custom exists generally in regard to tanneries, and the only conclusion I can draw from the evidence is, that it certainly did not exist in regard to this particular tannery.

The question then turns upon the terms of the contract, whether any such agreement can be found in it. Mr. Parsons says the purchase was made through Blake, from Whitelaw, the receiver. The terms then are to be found in the evidence of Whitelaw and Blake. Whitelaw says he made the sale to Blake, and delivered the leather to him, and made allowance of sixty-five pounds for the greenness of the leather. This statement he makes in an affidavit on 21st June, 1875, and one of its objects apparently is to shew that Thorne, Parsons &

Co. were not the purchasers, but the defendant Blake, and that the allowance made at the time of sale was intended to cover all shrinkage. But in November, 1874, Whitelaw gave a certificate that the sale was made to Blake for Thorne, Parsons & Co., and that the claim for shrinkage was a just one,—not apparently on the ground of contract, "but as usual in cases of sale." The affidavit read with the certificate would seem to shew that the sale was made to Blake for the petitioners, and that the agreement was silent as to any allowance for shrinkage beyond the sixty-five pounds.

Blake, in his affidavit, says he was authorized by the petitioners to buy, and on their behalf offered 31 cents per pound to the Receiver in April, 1874; the leather was then weighed, and found to be 6,311 pounds, from which sixty-five pounds were deducted for shrinkage, and Blake offered the petitioners' note payable at three or four months, which was refused, but afterwards accepted; that the leather was not weighed again until it arrived in Toronto; that the petitioners were to have the right to weigh the leather when it arrived at their warehouse in Toronto; and that it is the usual custom in dealing with tanneries to pay according to weight when it arrives at purchasers' warehouses.

From the remarks already made it will be seen that I do not rely much on Blake's evidence. But assuming his statement to be accurate, it does not say that the petitioners' right to weigh the leather arose out of any agreement with Whitelaw, and coupled with the last clause of the affidavit, I would infer that he meant to say the petitioners had that right because it was customary. It is clear there was only one agreement—that in April. The account rendered by the petitioners dates the short weight on 27th April, and the receiver's account specifies the same date for the sale.

I think the order of the Referee was right—the custom is not established—an agreement is not satisfactorily proved. The appeal will be dismissed with costs, which leaves it open for the petitioners to make another application.

Appeal dismissed.

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BRADY V. KEENAN.

[Chy. Cham.

BRADY V. KEENAN.

Vendor and purchaser—When purchaser entitled to rents and profits.

A purchaser is entitled to all the rents and profits arising from the estate purchased which accrue due subsequent to the time when he becomes such purchaser.

Where the conditions of sale were silent as to possession, and the purchase money was payable by instalments, and there was no stipulation as to securing the same by mortgage.

Held, that the purchaser was entitled to the rents and profits from the time of his purchase.

[September 11, 1875.—*Blake, V.C.*, on appeal from *Referee.*]

The lands in question in this cause were advertised for sale by auction, and in the advertisement of sale it was stated that possession would be given immediately after the removal of last year's crop. The attempted sale by auction proved abortive, and one Killan then made a written offer to purchase the lands on the following terms:—

"I hereby offer to purchase the land in question in this suit, being the north half of lot No. 10, in the 5th Con. of Ops, at, and for the sum of \$3,400, payable as follows: \$1,500 in cash, \$1,000 on the 5th of April next, and the balance being \$900, in two equal, annual instalments, from the 5th of April next, with interest at 8 per cent. per annum; and I agree to complete and carry out the said purchase at that price, and to pay the purchase money on the approval and acceptance of this offer by the Court of Chancery at any time within one month from this date, and on the completion of a clear title to the said lands.

Dated at Lindsay this 17th day of October, A.D. 1874."

This offer was accepted by the Master, and a report on sale was made, dated 31st October, 1874, which stood confirmed on 30th November, 1874. According to the report the purchase money was payable as follows: \$1,500 down, \$1,000 on the 5th of April, 1875, and balance of \$900 in two equal annual instalments, from 5th April, 1875, with interest on the whole unpaid principal of \$1,900 from the date of the report.

From the affidavits it appeared the purchaser paid \$1,500 into Court on the 5th December last, and the further sum of \$900 on the 29th day of April, 1875.

Possession was promised, but was not delivered to him until the 3rd of May, 1875, as a tenant refused to leave the premises.

The purchaser now applied for allowance of compensation for loss of possession from the month of December until 3rd May, 1875, when he obtained possession.

C. Moss for the purchaser.

H. Cameron, Q. C., for the plaintiff.

W.G. P. Cassels for defendant.

MR. HOLMESTED.—The purchaser's right to compensation must depend upon whether he was wrongfully kept out of possession during the period for which he claims compensation.

It appears that the offer to purchase, and also the Master's report are altogether silent as to when the purchaser was to be entitled to possession. The advertisement announcing the sale by auction contained a distinct stipulation on that point, but although the purchaser claimed to be entitled to the benefit of that stipulation, yet it is apparent that his offer makes no reference to the advertised conditions, and was made entirely independent of them, and there is therefore no room for saying that those conditions were in any way incorporated into the contract. His solicitor was forced to admit that the contract must be construed independently of the advertisement. He contended, however, that the contract being silent as to possession, the purchaser was entitled to be let into possession as soon as he paid the \$1,500 into Court. This seems a somewhat arbitrary time to fix, and there is no more reason for saying he was to get possession then, than there is for saying he was to get it at the date of the Master's report, or when it became confirmed, or when he paid the \$900. No authority is cited for this construction of the contract, and the case of *Kenney v. Wexham*, 6 Mad. 355 (cited in Dart V. & P., p. 581), seems to lead to a different conclusion. That was the case of the sale of an annuity; the purchase money was payable by instalments, and it was held that the purchaser was not entitled to the annuity until he had paid the last instalment of his purchase money. Here the purchase money was also payable by instalments, and there is no stipulation as to any part of the purchase money being secured by mortgage or in any other way. I think, therefore, according to the proper construction of this contract, the purchaser could not have insisted either on a

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conveyance being executed to him, or on possession being delivered to him until he had paid the full amount of his purchase money.

The case would of course be different where, as is usual, the conditions provide for the execution and delivery of a conveyance on payment of part of the purchase money, and giving a mortgage to secure the balance. In such a case the giving of a mortgage is equivalent to payment, for the purpose of entitling the purchaser to possession. Here the purchaser did not agree to secure, and has not secured the unpaid purchase money by mortgage, and I apprehend he could not be compelled so to secure it.

In sales by the Court possession will not, as a general rule, be ordered to be given to a purchaser except on the terms of bringing the purchase money into Court: see *Wilding v. Andrews*, 1 C. P. Coop. Temp. 380, and *Daniell's Chy. Prac.* p. 1184; *Anson v. Towgood*, 1 J. & W. 637-8; *Maurice v. Wainewright*, 1 C. P. Coop. Temp., Cott. 378, there cited, unless, of course, the sale is made subject to an express condition, that on payment of a part of his purchase money the purchaser should be entitled to possession.

If the purchaser would, on completing his purchase, have been entitled to the rents which had accrued from the date of his contract, until he had paid his last instalment of purchase money, it might have been urged, that the purchaser must, in any event, be entitled to recover, at all events, compensation equal to the amount of the rents for the period which elapsed from the date of his contract until he obtained possession. The rule, however, appears to be that a purchaser is only entitled to the rents and profits *from the time fixed for completion*, or the time he was entitled, under the conditions of sale, to possession (see *Dart. V. & P.* 229), and that this case, must be taken to be the time when the last payment of purchase money was to be made. The purchaser, according to my view of his rights, therefore, is not entitled to the compensation he claims, and his motion must be dismissed with costs.

The purchaser appealed.

BLAKE, V. C.—I think, where a person purchases property, from the time that he becomes such purchaser he is entitled to all rents and profits that may be derived from the estate

which accrue due subsequent thereto. If the vendor desires to reserve aught in his favor, he must do so by the conditions of sale which he enters into, and where he does not do so, the purchaser cannot be deprived of anything the estate may yield after his purchase. It may be a reason for an increased bid, that the buyer is aware, that shortly after the date of his purchase, a large sum for the year's rent will become due. I do not see, unless by express stipulation, that I could deprive him of the amount thus payable. I think here that the purchaser is entitled to the \$100 rent, and that it should be paid to him, with the costs of the applications made to procure it. No costs to the other parties. See 1 Dav. Conv., 2nd ed., p. 512; 1 Sugden on Vendors and Purchasers (Perkins's ed.), p. 148-49; 2 Dart on Vendors and Purchasers, 1102; Sugden, 14th ed., 104; 2 Dan. 1171; Fry on Specific Performance; *Twigg v. Field*, 13 Ves. 517; *Harford v. Purrier*, 2 Mad. 287; *Garrick v. Earl Camden*, 2 Cox 231.

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Service of papers—*Toronto solicitor agent for both parties.*

A Toronto agent, for one country principal, cannot serve himself as agent for another country principal. *Ontario Bank v. Fisher*, 4 Prac. R. 22, followed.

[September 14, 1875.—*Referee.*]

Motion on the part of the plaintiff upon notice for an order for the issue of a commission to Winnipeg, to examine a witness.

The notice was served by Messrs. Harrison, Osler and Moss, as agents for the plaintiff's solicitor upon themselves, as agents for the defendant's solicitors.

C. Moss, for the plaintiff.

J. S. Ewart, contra. The service of the notice is irregular: *Ontario Bank v. Fisher*, 4 Prac. R. 22. The General Order certainly says that service upon the Toronto agent shall be sufficient. But here there was in fact no service. A solicitor cannot serve and be served any more than he can at once give and receive. No action takes place, and therefore there is nothing which can be called service, which implies action.

C. Moss, in reply. *Ontario Bank v. Fisher* has more than once been disapproved of, although not

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expressly overruled. If it be upheld in this Court much inconvenience will result. He referred to the article in the *Canada Law Journal*, vol. ii., N.S., p. 309, commenting upon the decision, shew the evil consequences which would flow from the adoption of the practice.

The REFEREE, after consulting BLAKE, V.C., determined that *Ontario Bank v. Fisher*, must be followed wherever the objection is taken. But as it did not appear that defendant had been in any way prejudiced, he did not think it a case for giving costs.

MARTIN V. ROSS.

Changing venue—Balance of convenience—Costs.

If the plaintiff lays the venue in a confessedly improper place he is liable to be visited with the costs of a motion to change the venue.

The defendant and six of his witnesses lived in the County of Huron, and the plaintiff, an infirm person, sixty-five years of age, and three of her witnesses, lived in the County of Oxford. It was alleged by the defendant, and not denied by the plaintiff, that the plaintiff had witnesses in the County of Huron.

Held, that the balance of convenience was in favour of the venue being at Goderich, in the County of Huron. The venue was laid in Brantford.

[September 15, 1875.—Referee.]

Motion on behalf of the defendant to change the venue in this cause from Brantford to Goderich.

The affidavits filed in support of the motion stated that the defendant and six other persons were all material and necessary witnesses on his behalf, and resided in the County of Huron, forty-five miles from Goderich. The defendant also stated that the matters in controversy arose in the County of Huron, and that he believed the plaintiff's witnesses, if any, must also be resident in that County; and this allegation was not denied. On the part of the plaintiff, her own affidavit was filed, which stated that she was sixty-five years of age, and infirm and unable to travel; that she was a necessary witness on her own behalf; and that she and three others of her witnesses resided in or near the Township of East Nissouri, in the County of Oxford; and that she had one witness who resided in Michigan, who could more readily attend at London or Woodstock than at Goderich. She, however, did not deny that she had also witnesses resident in Huron, as the defendant suggested.

J. S. Ewart, for the motion.

Robb (Read & Keefer), on the part of the plaintiff, admitted that Brantford was not the most convenient place of trial, and that the venue had been laid there merely to expedite the hearing. He urged, however, that either Woodstock or London would be more convenient for the plaintiff than Goderich.

MR. HOLMESTED.—Taking the affidavits of both parties together, I think the balance of convenience is in favour of trying the cause at Goderich. If the plaintiff is really unable to travel so far herself, that difficulty may be overcome by an examination *de bene esse*. Where a plaintiff lays the venue at a confessedly improper place, I am inclined to think he should be visited with the costs of the application to change it. In this case, however, costs were not asked, and I shall therefore make them costs in the cause to the defendant.

Order granted.

BLOOMFIELD V. BROOKE.

Attachment against a party out of the jurisdiction.

Where a defendant, in default for non-compliance with a direction of a Master, was resident out of the jurisdiction of the Court:

Held, that an order for an attachment against him could be properly made.

[Sep. 30, 1875.—Proudfoot, V.C., on appeal from Referee.]

On a former day an application had been made for an order for an attachment against two of the defendants for non-compliance with a direction of the Master, requiring certain accounts to be brought into his office. It appeared that these defendants were not within the jurisdiction of the Court, and never had resided there, but that one of them was expected soon to come within the Province.

The REFEREE made the order.

The defendants appealed.

W.A. Foster for the appeal. The Court will not make an order which it cannot enforce. No attachment can issue even if an order is made, for an attachment must issue to the county in which

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the party is, or resides : Beames's Orders, *Boschetti v. Power*, 8 Beav. 183. It may have been necessary at one time to issue an attachment as the groundwork for other process, but that is no longer necessary under our General Order No. 290.

In *Hackwood v. Lockerby*, 3 W. R. 440, it was said that there was no precedent for issuing an attachment in respect of a person out of the jurisdiction. The Court will not place its process in the hands of any person to be used as he thinks proper.

Ewart, contra. This is an application in respect of a contempt. If it were in respect of contempt of any order of the Court, no application would be necessary, as, upon default, an attachment could be obtained upon *præcipe* under General Order 289, and in England an attachment upon *præcipe* for default in bringing in accounts in Chambers could be obtained upon *præcipe*, for there a formal order is made, and not a mere direction : *Daniell's Pr.* 908-910, 1122. All that is here sought is a special order that we may be in the same position to enforce obedience, as we would be under the General Orders if the contempt were in respect of an order, and not simply a direction. The only other mode of reaching the defaulters is by sequestration, and attachment always precedes sequestration, which is a writ of only ultimate resort : Seton on Decrees 1240; *Miller v. Miller*, L. R. 2 P. & D. 56; *Nelson v. Nelson*, 6 Pract. R. 196. In England a sequestration issues upon *præcipe* after return *non est inventus* to an attachment : Morgan's Chancery Acts and Orders, 417 (Order 219 of 18th July, 1857), and although it has been doubted, it now seems established that a special order can be made for sequestration without an attachment : *Hodgson v. Hodgson*, 23 Beav. 604; *Re East of England Bank*, 10 Jur. N. S. 1093; *Sykes v. Dyson*, L. R. 9 Eq. 228; *Miller v. Miller*, L. R. 2 P. & D. 56.

Moreover, an order for attachment is necessary in order to place the defendants in contempt, and protect the plaintiff from applications which may be made by the defendant in respect of the delay caused by their default : *Gillespie v. Gillespie*, 2 Chy. Cham. 267. A sequestration would not seem to be sufficient for this purpose : *Tatham v. Parker*, 17 Jur. 929.

PROUDFOOT, V. C., said that for the purpose of this application he must assume that the defendant was really in default, as it so appeared by the Master's certificate. This being so, there

was no reason why the writ of attachment should not issue to be enforced in case the defendant came within the jurisdiction of the Court.

Appeal dismissed with costs.

BLOOMFIELD V. BROOKE.

Payment of money into Court—Con. Gen. Order 352.

Money ordered to be paid into Court must be paid into the Canadian Bank of Commerce, as provided in Con. Gen Order 352, and in no other manner.

[September 30, 1875.—*Proudfoot*, V. C.]

A Receiver had been appointed by an order which directed him to pay all moneys into Court. A large sum having come into Court, and the probabilities being that a considerable time would elapse before it would be distributed.

J. S. Ewart for the plaintiffs, moved for an order that the money should be transferred from the Canadian Bank of Commerce to the Dominion Bank, the latter having offered to allow one per cent. higher interest than was allowed by the former under its arrangement with the Court.

C. Moss for the defendants. General Order 352 provides the only way in which money is to be paid into Court, and payment in any other way might not be a discharge. If the Court will take the responsibility and risk, and discharge the debts, the defendants do not resist the motion.

Ewart, in reply. Order 352 only points out the way that money is to be paid into Court, where no other direction is made, and the words "and in no other manner" refer merely to the money being paid in "with the privity of the Accountant." The estate will suffer considerable loss if this motion is refused. The Dominion Bank is shewn to be in good standing, and unobjectionable.

PROUDFOOT, V. C.—The Court cannot make all the enquiries necessary to satisfy itself as to the position of every bank in which it may be proposed to deposit money directed to be paid into Court. The motion must be refused, costs to be costs in the cause.

Motion refused

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GORDON V. HANNA.

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GORDON V. HANNA.

Substitutional service—Means of knowledge—Con. Order 259.

Substitutional service of the bill upon an absent defendant allowed where the affidavits stated that "none of the parties in this country were aware of the residence of the defendant; that the plaintiff's solicitor had made diligent enquiry and could not find out where the defendant resided; and that deponent was informed that the defendant led a wandering life; that she had been in Rochester about a month before, but that she then intended shortly to make a move."

[October 4, 1875.—*Proudfoot, V.C.*, on appeal from *Referee.*]

This was a partition suit, and the plaintiff on 28th Sept., 1875, applied for an order allowing substitutional service of the bill on Margaret McKim, one of the defendants.

W. G. P. Cassels for the plaintiff.

MR. HOLMESTED.—Two affidavits are filed in support of this motion. The first, by Mr. Armour, states that the bill had been taken *pro confesso* against all the defendants except seven, of whom six have answered, admitting the allegations in a bill, and the seventh, an infant, has filed the usual infant's answer by his guardian. Mr. Armour further states, "that neither the plaintiff nor any of the defendants except the defendant Margaret McKim is aware of the residence of the said Margaret McKim"; this statement fails to show the deponent's means of knowledge, and is therefore in contravention of General Order 259. He also states: "I have made diligent enquiry, and cannot find out where the said Margaret McKim is." This allegation is open to the objection made by Esten, V. C., to a similar affidavit, he holding that the affidavit should show what exertions had been made, so that the Court or Judge might be enabled to determine whether or not the defendant was absconding, or that it would be proper to dispense with personal service: *Murney v. Knapp*, 1 Chy. Ch. 26. Mr. McMichael's affidavit shews that his firm had acted for the defendant as her solicitors, but has had no communication with her since January, 1873. He states that the defendant leads, as he is informed, a wandering life, not staying in any place a length of time. This allegation is also open to the objection that it fails to show the deponent's source of information. He further states, "that about the 21st August last, upon making enquiries at the instance of the plaintiff's solicitor herein, he was informed that the defendant, Margaret McKim, was then living in Rochester, in the

State of New York, but was then told it was her intention soon to make a move therefrom." This allegation also fails to show who was the deponent's informant: *Woodhatch v. Freeland*, 11 W. R. 398. No enquiry or attempt to find the defendant in Rochester has been proved, nor does it appear that Mr. McMichael is unable to give sufficiently precise information to enable the plaintiff's solicitor to make that enquiry without much trouble and expense.

In *Pearson v. Campbell*, 2 Chy. Ch. 25, an application was made for substitutional service upon a defendant who resided in New York. It did not appear that there would be any difficulty in serving him, and the motion was refused. In that case the present Chancellor said: "The statute is intended to apply to cases where the defendants are very numerous, or where they reside out of the jurisdiction, at a very great distance, or where the residence is not known at all, or where from any other cause it would be very difficult or expensive to effect service." The defendants in this case are numerous, and assuming the plaintiff's bill to be true, most of them would be in the same interest as the absent defendant. At the same time, I am not aware that that fact alone has yet been held a sufficient reason for dispensing with service on a necessary party to a cause. The affidavits in this case fail to show that sufficient information cannot be obtained to enable the plaintiff to effect personal service without much expense, and until this is shown I do not think the application can be properly granted.

The plaintiff appealed.

PROUDFOOT, V. C., made an order for service by advertisement to be published in the *Toronto Globe* and a Rochester paper.

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MOONEY v. MOONEY.—NASH v. GLOVER.

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MOONEY v. MOONEY.

Changing venue—Difference in expense of procuring attendance of witnesses.

Where the venue was laid at London, and it appeared that the defendant, six of his witnesses, and one of the plaintiff's witnesses resided at Clinton, in the County of Huron and that the plaintiff and three of her witnesses resided at London (her other witnesses being at a distance, and one of them resident out of the Province), and that in procuring the attendance of the witnesses residing at Clinton and London there would be only a difference of \$15 or \$16 in favour of hearing the cause at Goderich, in the County of Huron.

Held, that this difference in expense was not sufficient to deprive the plaintiff of the right of having the cause heard at London, where the venue was laid.

[October 14, 1875.—*Referee.*]

Motion to change the venue from London to Goderich.

From the affidavits it appeared that the plaintiff's cause of suit, if any, arose at the town of Clinton, in the County of Huron; the defendant and six of his witnesses resided at Clinton; one of plaintiff's witnesses also resided there; the plaintiff and three of her witnesses resided at London; one witness for the defendant resided at Kincardine; one witness for the plaintiff resided at Owen Sound, and another at Montreal.

J. S. Ewart for the motion.

W. G. P. Cassels for the plaintiff.

MR. HOLMESTED.—On looking at the affidavits I have come to the conclusion that the difference of expense is not shewn to be sufficiently great to justify me in depriving the plaintiff of the right to have the cause heard at London.

With regard to the witnesses living elsewhere than at Clinton and London, it is impossible from the affidavits to say whether there would be any difference of expense in procuring their attendance at the two places named; and as far as the London and Clinton witnesses are concerned, the difference of expense appears to be only \$15 or \$16 in favour of Goderich. This is not, I think, sufficient ground for changing the venue.

I must therefore refuse the motion; but I think, under the circumstances, the defendant was justified in making the application, and that the costs should be costs in the cause. (See *Noad v. Noad*, 6 Prac. R. 48; *Crawford v. Crawford*, before PROUDFOOT, V. C., October, 1874.)

Order refused.

NASH v. GLOVER.

Leave to appeal from a report—Costs of unnecessary proceedings.

On an application for leave to appeal from a report notwithstanding its confirmation it is only necessary to shew: (1.) that the delay is excusable; and (2.) that there are reasonable *prima facie* grounds of appeal.

Costs of evidence unnecessary for these purposes will be disallowed.

[October 16, 1875.—*Referee.*]

By the decree of this Court a question of boundary involved in the cause was referred to Mr. Passmore specially, who has made his report, which was filed and confirmed. The plaintiff now applied for leave to appeal from this report, notwithstanding its confirmation.

R. Martin, for plaintiff.

C. Moss, for defendants.

MR. HOLMESTED.—On the argument of the motion, I was satisfied that it was a proper case to grant the plaintiff leave to appeal, and the only question which I thought it necessary to reserve, was the question of costs, which, owing to the great length of the affidavits and depositions, is a matter of some moment.

The plaintiff's case was shortly this: that the report in question was made and filed without due notice to him, and that he had been misled by letters written to his solicitors by Mr. Passmore subsequently to the making of the report. The plaintiff, however, undertook to show that Mr. Passmore had been guilty of malpractice and deceit, and that he had been acting collusively with the defendant's solicitor in keeping the plaintiff's solicitors in the dark as to the making of the report.

The plaintiff, moreover, has thought it necessary to enter into a most elaborate history of the proceedings under the reference from the very commencement, and has also adduced evidence at great length in order to establish that the report is erroneous.

I am of opinion that a great deal of the evidence adduced on this application was quite unnecessary, and that the plaintiff has unreasonably increased the expense of the application. It must be remembered that it was only necessary for the purpose of this application to establish two things; first, that the delay was excusable; and second, that the applicant had *prima facie* reasonable ground of appeal.

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To establish the first proposition it was unnecessary to the plaintiff's case to charge Mr. Passmore with fraudulent conduct in concealing the making and signing of the report. The plaintiff's solicitors had Mr. Passmore's own letters to them and copies of their letters to him, and very little else was needed to establish that they had been misled, as they allege. The charging Mr. Passmore with fraud did not necessarily help the case; because, although I am of opinion that Mr. Passmore has cleared himself of such a charge, I nevertheless think the plaintiff entitled to the opportunity to appeal which he asks. So far, therefore, as the costs of the application have been increased by that charge, the plaintiff must pay them in any event.

Then as to the second branch of the case, as I am not finally to determine the question whether or not this report is erroneous, it was only necessary for the plaintiff on this application to show that he had *prima facie* a reasonable ground of appeal. This could have been done without going into such voluminous details as the plaintiff has done, in this case. Some of the affidavits and depositions may be properly enough used on the application to the Court to set aside the report, but I do not think the costs of this application should in any event be increased by their having been used here.

So far as the costs have been properly incurred, they must be costs in the cause to both parties. So far as the costs have been increased by charging Mr. Passmore with fraud and collusion with the defendant's solicitor in concealing the issuing of the report or attempting to establish that charge, I think the plaintiff should pay them.

With regard to the charges of fraud and collusion against Mr. Passmore and the defendant's solicitor in conducting the reference, I am not called on to determine whether or not they are well founded; they form part of the plaintiff's alleged grounds of appeal from the report, and the Court will dispose of that question on the appeal. So far as the costs occasioned by those alleged grounds of appeal are concerned, however, they must be governed by the same rule as is applicable to the other alleged grounds of appeal. The applicant was entitled to set them up and swear to them as a ground of appeal, but I do not think on this application he was justified in going so minutely into evidence with a view to establish their truth. That matter must be left to the discretion of the taxing officer.

BRITISH AMERICA ASSURANCE CO. V. WILKINSON.

Production of documents—Documents assigned to a third party, the object of the assignment having been accomplished.

The defendants objected to produce certain documents, on the ground that they were in the possession of a third party, to whom the defendants had assigned all their estate for the benefit of their creditors. The assignee had realized the estate, and distributed the proceeds amongst the creditors.

Held, no excuse for non-production and a better affidavit was ordered.

[October 16, 1875.—*Referee.*]

The defendants, the Strathroy Woollen Manufacturing Co., filed an affidavit of their president, in answer to an order for production, from which it appeared that they had certain documents in their possession, but that they had assigned all their estate for the benefit of their creditors to one Thomas Churcher, who was not a party to the cause, on the 5th September, 1873 (prior to the institution of this suit), and that the documents in question were then handed over to Mr. Churcher, and were, at the time of this motion, in his possession, and that the defendants had no power over the documents, and could not produce the same.

From the eleventh paragraph of the answer it appeared that Mr. Churcher had realized the estate, and divided the proceeds among the creditors.

W. G. P. Cassels for plaintiff.

G. M. Rae for defendants.

MR. HOLMESTED.—As Mr. Churcher has realized the estate of the defendants, and distributed the proceeds amongst the creditors, the purpose for which the assignment was made would therefore appear to be executed, and it would therefore seem that, as to these documents, there may still be a resulting trust in favour of the defendants' company. At all events that fact is not in any way negatived by the affidavits; neither does it appear that any application has been made to Churcher, or that he refuses to allow the documents in question to be produced.

It appearing that the purpose for which the alleged assignment was made has been satisfied, I do not think the affidavit which has been filed sufficiently excuses the non-production of the books, &c., assigned to Churcher, and therefore

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I think that a further and better affidavit must be filed. This being the second application, I think defendant must pay costs of the application.

Order granted.

WATERS v. BURRILL.

Dismissing bill for want of prosecution—Delay on the part of the defendant.

Where the proceedings in the suit have been conducted in a loose manner on both sides, without regard to the strict practice of the Court:

Held, that delay on the part of the defendant, and acquiescence by him in delay on the part of the plaintiff, rendered it inequitable to allow the defendant suddenly to determine the dilatory method of conducting the suit, and insist upon a strict compliance by the plaintiff with the practice of the Court; and a motion to dismiss was therefore refused.

[October 18, 1875.—*Proudfoot, V.C.*]

An order dismissing the bill for want of prosecution had been granted by the Referee, under the circumstances which appear in the judgment below.

The plaintiff appealed.

C. Moss for the appeal.

N. W. Hoyles contra.

PROUDFOOT, V. C.—The prosecution of this suit has been very leisurely. The bill was filed on the 21st October, 1874, and amended on the 8th January, 1875. The defendant McDonald filed his answer on the 11th January, Burrill on 6th March, Wallbridge on 13th March. The Spring Sittings were held on 14th April, 1875. The plaintiff took out an order for production on the 19th March, Burrill did not do so till the 24th August.

It appears that the solicitor for the plaintiff had been ill, and unable to attend at his office for three months prior to April, 1875, and the solicitors for the defendants, influenced probably by kindly feelings, did not press for the prosecution of the suit, and as compensation for their liberality took plenty of time for their own proceedings. Wallbridge, one of the defendants, thinks the application of the plaintiffs to amend quite reasonable, and assents to it. The

defendants McDonald and Burrill appear by the same solicitors, but have put in separate answers.

The correspondence between the plaintiff's solicitors and the solicitors for the defendants McDonald and Burrill shews that mutual indulgence and forbearance was given. On the 5th April plaintiff's solicitors write: “As we have not, on either side, been following the practice strictly, I am not sure but that my time for putting in replication has arrived. For the same reasons as those mentioned by me to yourself, I may have to ask you to let the suit stand as well in the matter of production as that of answer, till I have a fair chance of looking into the details. I may have to amend as you intimated. I have been obliged to allow everything possible to stand over for a time, this suit among others. My three months' absence from the office has imposed a heavy task on me, which, as yet, I am ill able to meet.” The next day the defendants' solicitors reply: “He,” the defendant, “is desirous of raising money to go into business, and we do not therefore find ourselves in a position to do more than say that we would wish you as soon as possible to give the affidavits on production, and then we can examine the plaintiffs; but we are not hostile, and we do not wish by the words “as soon as possible,” to cramp you, leaving it to your own convenience in reason to put in the affidavit, and to reply when you in reason can conveniently do so, so that the suit will not hang over the man's head longer than the practice of the Court will permit.”

No further correspondence took place till the 24th August, when Burrill's affidavit on production was filed, and his solicitors write to plaintiff's solicitors: “We would ask you, after so long a delay in this matter, to press the suit forward. Replication and affidavit on production.”

When notice of filing this affidavit of Burrill's was served on plaintiff's solicitors on 24th August they remarked to the clerk who served it on the laxity with which both sides were practising, and to the effect that they might on their own part require some further time, and to this the clerk's reply was quite reassuring.

On the 10th September plaintiff's solicitors write: “We have not been practising very strictly in this suit, and we believe it is our turn to be behind. We have written our client to come in and swear affidavit, and will put in replication before long. Will you take short notice if we so desire? I have not read the answers

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yet, but I suppose little or no evidence will be required at hearing." The Autumn Sittings were held on 29th September, 1875.

On the following day plaintiff's solicitors received from their agent in Toronto a copy of a notice to dismiss the bill served on them, which seemed to them so totally at variance with the whole course of practice in this suit that one of them had an interview with Mr. Dougall, one of the defendants' solicitors, the same day, who stated that he had not anything to do with the notice, but that it was his partner, Mr. Clute, then in Toronto, who had taken this step, and he could do nothing without him.

Before hearing from Toronto the plaintiffs' solicitors had taken steps to have their affidavits on production put in,—two of the plaintiffs living in different counties in Canada, and one in the State of Illinois—and they have been put in.

An affidavit of Mr. Dougall was read, subject to the objection that it was not used on the motion to amend, but on the motion to dismiss. Whatever may be the force of that objection in other circumstances, it cannot prevail here, for the affidavit of the solicitor of the plaintiff on this application refers to it, and in fact his affidavit is not intelligible without referring to Mr. Dougall's.

In the tenth paragraph of Dougall's affidavit he states a conversation with Mr. Bell, where he told Mr. Bell that after an affidavit on production of the plaintiff's had been made and filed, and after examination of the plaintiffs on the bill, that the defendants Burrill and McDonald might desire to change their pleadings, particularly McDonald, and that he did not want Mr. Bell to delay so long as to prejudice McDonald by not having the said affidavit on production filed, not having examined the said plaintiffs on their bill. He says this conversation took place in April last,—Mr. Bell, referring to this paragraph in his affidavit, says that it took place on the 11th September. If it took place on the former date, the subsequent delays of the defendants deprive it of much value; if on the latter, it is entirely in favour of the plaintiffs. But as the date is material, and there is but oath against oath, I lay it out of consideration. I the more readily do so because Mr. Bell says one of his clerks was present at it, but there seems to be no affidavit from the clerk on the subject.

One of the plaintiffs swears to the truth of the proposed amendments, and that he believes the

plaintiffs have a good cause on the merits, and fully intend to prosecute the suit which has been instituted in good faith. And that the application is made in good faith, and not for the purpose of embarrassing the defendants; and that without the amendments he believes his interests in this suit will be sacrificed.

There is no affidavit on the part of the defendants contradicting this.

Looking at the whole course of the proceedings in the cause—the delays on both sides—the statements on the plaintiffs' part that strict practice was not pursued, not contradicted by the defendants, and acted on by them,—the effect of which was to lull the plaintiffs into security, that no stringent compliance would be required,—I think the justice of the case will be best met by permitting the plaintiffs to amend.

Beyond this, however, I am inclined to adopt the very sensible rule laid down by the Referee in *Archibald v. Hunter*, 2 Chy. Ch. 277, that where defendants appear by the same solicitor, and one does not file his affidavit on production till long after the other, that the delay is to be counted from the latter date as against both.

In this the Referee acted in accordance with the decision *Winthrop v. Murray*, 7 Hare, 150, and I do not think this case is materially different, because the affidavit here does not state that the plaintiff could not amend without the affidavit of defendant on production. It was well known to both parties here that the plaintiff would probably have to amend,—it was the subject of discussion between them in April,—and in scarcely any case would it be prudent to amend without knowing what information could be got from the productions of the other side.

One of the questions being whether Wallbridge had divested himself of all his estate when assigning to Burrill, rendered it peculiarly necessary that the plaintiffs should see the assignment before amending.

Gillespie v. Gillespie, 2 Chy. Ch. 267, does not support the broad proposition that the defendant may move to dismiss when he has not obeyed the order to produce. In that case he has filed an affidavit which the plaintiff contended was insufficient. But the plaintiff had not complained of that, nor sought to enforce compliance with the order. He slept till awakened by the motion to dismiss. And this seems to be approved by the Chancellor

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in *Wilson v. Black*, 6 Prac. R. 130. But in neither of these was there such contributory negligence, if I may so speak, such inducement to delay, as in this case.

It was said in argument that the case of *McEvoy v. Clune*, 21 Gr. 515, involving the same question as is raised in this bill, was being appealed, and that the plaintiff might reasonably desire to wait the determination of that case before he proceeded with this. But there is no evidence before me that an appeal is pending to bring it within the case of *The Lindsay Petroleum Co. v. Hurd*, 6 Prac. R. 140.

Among the circumstances to guide the discretion of the Court in permitting amendments, the nature of the rights claimed by the defendants is important. Had the defendants asserted an absolute title in themselves, and denied any claim or right in the plaintiffs, a more stringent rule might properly be applied than where a title is admitted. Here the defendant McDonald admits (par. 19) the plaintiff's right to redeem an undivided moiety. And Burrill, admitting himself to be a mortgagee only, denies that the plaintiffs are entitled to redeem, but says that the purchaser at the sheriff's sale is,—the validity of the sale being a question in issue. Dismissing the bill on an application of this kind does not operate as a foreclosure. The nature of the title may well account for the easiness with which the suit was suffered to drag along, and strongly confirms the view that the defendants were comparatively indifferent to speed,—as they could not be prejudiced by the delay, the plaintiffs offering to redeem them.

At all events, it would be unjust and inequitable to permit one of the parties without notice, without warning or intimation, suddenly to terminate this course of procedure, and insist upon a stringent compliance with the practice of the Court. This had the effect, as sworn to, of taking the plaintiffs by surprise.

I therefore allow the appeal. The costs to be costs in the cause. I do not give them to either party, as both have been dilatory, but leave them to abide the result of the suit.

LISCOMBE V. GROSS.

Vendor and purchaser—Right to rents and profits of estate sold—Rent paid in advance and accrued due before day of sale.

By the conditions of a sale the purchaser at a sale under a decree of the Court was entitled to a conveyance one month after the day of sale upon forty per cent. of his purchase money being then paid, and the remainder secured, but he was not entitled to possession (except for the purpose of doing the fall ploughing), until the expiry of a subsisting lease of the premises. The rent payable under the lease was payable yearly in advance, and a year's rent accrued due a few days before the day of sale.

Held, that the purchaser was entitled to a proportionate part of the rent received in advance for that portion of the term which had to expire subsequently to the day fixed for the completion of the contract, i. e., one month after the day of sale.

[October 21, 1875.—*Referee.*]

This was an application on behalf of James Mitchell, a purchaser, to be allowed a rebate of his purchase money for rents and profits of the property purchased for a period between the day fixed for completion of the contract and the day on which he was to be entitled to actual possession.

The sale took place on the 5th August, 1875. In the advertisement of sale it was stated that the property purchased, (parcel 1), was in the occupation of Messrs. Enoch King & Son. The conditions of sale provided that the purchaser should pay 10 per cent. of his purchase money at the time of sale, sufficient with the 10 per cent. to make 40 per cent. in one month thereafter without interest, upon payment of which, the purchaser was to be entitled to a conveyance, he executing a mortgage on the property to secure the balance of his purchase money with interest from the day of sale at 8 per cent. The purchase money of parcel 1 was \$8,000, and of parcels 5, 6, 7, and 8, the aggregate amount was \$2,190. The conditions further stated that possession would be given of all the lands on the 2nd day of April, 1876; the purchaser to have the right to enter to do fall ploughing.

The terms on which King & Son held were not stated in the advertisement; and nothing was said as to the rents and profits between the day of sale and the date fixed for the delivery of possession.

It now appeared on the motion that King & Son held as lessees of the mortgagor, (the suit being one for sale under a mortgage), for a term

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LISCOMBE V. GROSS.—RE TOBEY.

[Chy. Cham.

which would expire on the 1st April, 1876, at an annual rental of \$876. By the terms of the lease the rent reserved was payable annually on the 1st August in each year. The last payment of rent had therefore actually become due and payable before the sale took place.

G. Y. Smith, for the purchaser.

A. G. McMillan, for the plaintiff. The purchaser is not entitled to any rents and profits for the period between the day of sale and the 1st April, 1876, when it was agreed that possession should be given, because (1.) no rent will accrue, and because (2.) the purchaser according to the terms of sale is not entitled to possession.

MR. HOLMESTED.—With regard to the first point taken by the solicitor for the vendor, I am of opinion that the mere fact that the rent as between the lessor and lessee is payable in advance cannot affect the right of the vendee as against the vendor. As between him and the vendor, I think the latter would be bound to account for a proportionate part of the rent received in advance for that period of the term which had to expire subsequently to the day appointed for the completion of the contract, *i. e.*, a month from the day of sale: See 37 Vict. ch. 10, sec. 1, (O.)

With regard to the second point, the proper construction of these conditions is, I think, that the purchaser is not to be entitled to the actual possession until 2nd April, 1876, and in that sense he is not to get possession until then, but so far as being let into the receipt of the rents is concerned, I think he was entitled to that according to the true construction of the conditions of sale from the day fixed for completion.

It is considered unreasonable to say that the purchaser is to pay interest on his purchase money, and be deprived of the profits derivable from the land as well.

In *Brady v. Keenan*, ante p. 262, Blake, V.C., seemed to be of opinion that the purchaser is entitled to the rents and profits from the time he is called upon to pay interest on his purchase money, irrespective of any question as to his right to possession, in short that the vendor could not in the absence of an express contract to that effect, be entitled to both the rents and also the interest on the purchase money.

It was urged that the purchaser in this case would be getting a double benefit for the land, as he would have both the use of it for the purpose of fall ploughing, which it was said was all the use that could be made of it at this season of the year, and would also be getting the rents as well. I think this affords no objection to his getting the rents. I think he is entitled to all the benefit the land will yield whether in the way of rent or of actual enjoyment so far as it can be had according to the terms of the contract. I do not think this application an unnecessary one, because the rent in question as between the lessee and lessor having become due and payable before the sale, the legal right to recover it from the lessee would not pass by a subsequent conveyance of the reversion.

I think the purchaser is entitled to the rebate which he claims, and also to his costs of this application. The affidavits filed with the view of attempting to add a term to the written contract, signed by the purchaser, I do not think should be allowed. I think they were inadmissible, and I have not regarded them in disposing of this application. The vendor's costs must be costs in the cause.

Order granted.

RE TOBEY.

Revocation of Will—32 Vict. cap. 8 (Ont.)

Held, under 32 Vict. cap. 8. (1.) That a will is not revoked by destruction by the direction of the testator, unless the destruction take place in his presence. (2.) The birth of a child after the making of a will does not revoke the will.

[October 25, 1875.—*Proudfoot, V. C.*]

The testator in this case made his will in 1873. After making his will a child was born to him. The testator directed one Kerr, who drew the will, to destroy it. Kerr took it to his own house and destroyed it there, but not in the testator's presence. He prepared a new will by the testator's direction, but this was not executed when the testator died, on the 12th April, 1873.

The devisee under first will filed a petition under 29 Vict. c. 25, to quiet his title.

Two questions were discussed: 1. Whether the destruction of the will not in the testator's presence revoked it? 2. Whether the change

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in his circumstances by the birth of a child, coupled with the ineffectual attempt at revocation had that effect.

N. W. Hoyles, for petitioner.

R. H. Greene, for the infant heirs-at-law, contestant.

Proudfoot, V. C.—The law applicable to this case is the Ontario Statute, 32 Vict. c. 8. The 5th section enacts that no will or codicil shall be revoked otherwise than aforesaid, (viz., by marriage), or by another will, &c., or by the burning, tearing, or otherwise destroying the same by the testator or by some one in his presence, and by his direction, with the intention of revoking the same. On a similar section of the English Wills Act, it has been held that where a codicil had been burnt by the testator's order with intent to revoke, but not in his presence, probate was decreed of a draft copy of the codicil: In the goods of *Dodds*, 1 Dea. Ecc. Cases, 290.

The language of the Act is so plain that a decision was scarcely necessary to aid in deciding that the destruction in the present case did not revoke.

As to the other point, the 4th section enacts that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. A learned discussion on this subject, shewing what the law was before the Act, is to be found in Williams on Executors, vol. 1, p. 179 *et seq.* (6th ed.), and as to the effect of marriage alone, and marriage and the birth of a child, or as to the birth of a child after the making of the will—after noticing that marriage now is of itself a revocation, the author proceeds: “All such cases, however, appear to be provided for by the 19th section, (4th sec. of Ontario Act), and consequently the 19th section (4th section) of the new statute will prevent such revocation in future.” The birth of the child, therefore, in this case, did not revoke the will. Kerr, who drew the destroyed will, proves its contents. Under that the property will pass.

C. L. Cham.]

CASEY v. MCGRATH.

(C. L. Cham.)

COMMON LAW CHAMBERS.

CASEY v. MCGRATH.

Ejectment—Notice limiting defence.—Amendment

When a defendant files his appearance, the cause is at issue, and the plaintiff may serve issue book and notice of trial. Defendant may, however, within four days, give notice limiting his defence; and, if he do, may, under the powers of amendment in the Administration of Justice Act, have the issue book amended in accordance with the limitation, but he is not entitled to have the notice of trial set aside.

[November, 2, 1875.—*Mr. Dalton.*]

The defendant having filed his appearance and notice denying plaintiff's title, and claiming title in himself in ordinary form, the plaintiff made up the issue book, and served it together with notice of trial. Subsequently to the service of the issue book and notice of trial, but within the four days allowed by the C. L. P. Act, sec. 12, defendant filed notice limiting his defence; and immediately obtained a summons calling upon the plaintiff to shew cause why the issue book and notice of trial herein should not be set aside for irregularity, on the ground that the issue book did not contain defendant's notice limiting defence.

Osler shewed cause. As soon as a defendant in ejectment files his appearance, the cause is at issue, and plaintiff is at liberty to serve the issue book and notice of trial forthwith. According to section 12 of the C. L. P. Act, "an appearance without such notice confining the defence to a part, shall be deemed an appearance to defend for the whole." If defendant wish to limit his defence, the proper practice is to file and serve notice to that effect with the appearance; and if this is not done, plaintiff may proceed on the understanding that the cause is at issue. The notice which defendant files, limiting his defence, is on its face embarrassing; so that the proceeding looks very like a trick to throw the plaintiff over the Assizes, and, on the authority of *Vrooman v. Vrooman*, 17 U. C. C. P. 523, should be struck out. Under the powers of amendment in the Administration of

Justice Act, the defendant should not be allowed to defeat the plaintiff's notice of trial.

Davidson contra. Under section 12 of C. L. P. Act, defendant's notice limiting his defence is perfectly good if filed within four days after the filing of his appearance. This is a right given by the Act, which cannot be overridden by plaintiff's voluntary expedition in making up and serving his issue book before the expiration of the four days. The notice of trial should be set aside, and the issue book amended by inserting defendant's notice limiting his defence. See *Grimshaw v. White*, 12 U. C. C. P. 521, and *Phillips v. Winter*, 3 Prac. R. 312.

MR. DALTON.—It is quite true that under the Act the defendant has four days after appearance within which to file his notice limiting defence. It is also true that when a defendant wishes to defend for a portion merely of the land claimed by plaintiff, the practice is to file a notice limiting his defence to the particular portion which he claims at the same time that he files his appearance. If, then, as in the present instance, the defendant choose to take advantage of the four days allowed him by sec. 12, and file his appearance without such notice, the plaintiff is also justified in considering that the defendant intends to defend for the whole. This being the case, the plaintiff, when he finds a simple appearance filed, may properly treat the cause as at issue, and proceed accordingly. The clause of the Administration of Justice Act as to amendments obviates, in my opinion, the difficulties under the former practice. The defendant has, of course, a right to have the issue book amended so as to include his notice limiting defence; but I cannot set aside plaintiff's notice of trial.

Order accordingly.

C. L. Cham.]

BACON V. CAMPBELL ET AL.—METCALF V. DAVIS ET AL

[C. L. Cham.

BACON V. CAMPBELL ET AL.

Administration of Justice Act, 1873, sec. 24—Examination of defendant—Ejectment.

One of two defendants in an action of ejectment allowed judgment to go by default: Held, that he was nevertheless liable to be examined under Administration of Justice Act, 1873, sec. 24.

[December 14, 1875.—*Mr. Dalton.*]

This was an action of ejectment. The plaintiff claimed title to the lands by reason of a breach of a covenant in a lease not to assign or sub-let without leave. Campbell was sued as the sub-lessee of his co-defendant Hayes, to whom, when served with the writ, he handed it, saying, "you must help me out of the difficulty." Hayes defended for the whole of the land, but no appearance was entered for Campbell, against whom judgment was signed by default. Subsequently to this the usual *ex parte* order to examine Campbell was taken out: but by advice of counsel he refused to be sworn when attending before the special examiner. A summons was then taken out to set aside the order to examine.

Mr. Armour (Crawford & Crombie) showed cause. The order was perfectly regular. The cause was at issue as to the other defendants, and the Act is broad enough to cover this case. Campbell did not necessarily admit the title of plaintiff by allowing judgment to go against him by default. He was still in possession, and it was such a case as was contemplated by the 36 Vict., cap. 14, (Ont.), which enables a plaintiff to recover costs against a defendant who does not defend an ejectment suit, on an affidavit of actual adverse possession. The case is somewhat analogous to that of a defendant in equity who disclaims, and who, if costs are asked against him, cannot avoid giving discovery by disclaiming: Daniell's Ch. Pr., 5th ed., 613. Even if the defendant's possession be not adverse, his interest is adverse to the plaintiff's, and this is all that is necessary under the Act. He plainly identified his interest with that of Hayes, by stating that he would have to help him out of the difficulty. Even if Campbell were considered as a mere witness, he could not evade discovery on that ground: Daniell, p. 255.

Monkman, in reply: The Act contemplated the cause being at issue with the particular defendant sought to be examined. The plaintiff

could not say that he had a good cause of action against Campbell on the merits, for the action as regarded him was ended. Unless the plaintiff could make such an affidavit he could not obtain the order to examine.

MR. DALTON.—I think the summons should be discharged. The point fixed by the Legislature after which the order may be obtained, is merely a matter of procedure; and is meant to prevent the plaintiff from "fishing," in order to frame his next pleading. I do not think the Act intends to restrict the plaintiff to the examination of a party who actively defends the suit. It does not expressly provide, nor even intimate, that the cause should be at issue with the defendant sought to be examined. If the defendant's contention were well founded a defendant might collude with a co-defendant, and allow judgment to go against him by default, thus evading discovery, while at the same time he might be the only person in possession of the facts of the case. As the case is a new one, the costs will be costs in the cause to the plaintiff.

Summons discharged.

METCALF V. DAVIS ET AL.

Writ for service within jurisdiction—Amendment.

[December 23, 1875.—*Mr. Dalton.*]

A writ for service within the jurisdiction was served on two of the defendants at a place out of the jurisdiction. An application was made to set aside the service on the ground of this irregularity.

Brough showed cause.

Osler, contra.

MR. DALTON refused to make the order asked for, as the plaintiff had not been in fault, the domicile of the defendants being within the jurisdiction; but he gave leave to issue, *nunc pro tunc*, a concurrent writ for service out of the jurisdiction, amendment of the copies served to be made in accordance therewith. Costs to be costs in the cause.

C. L. Cham.]

WORDEN v. DATE PATENT STEEL Co.

[C. L. Cham.

WORDEN v. DATE PATENT STEEL Co.

Common counts—Amendment of particulars.[December 28, 1875.—*Mr. Dalton.*]

In this case plaintiff delivered particulars under the common counts, the last two items of which were for salary from March, 1875, to March, 1876, and from March, 1876, to March, 1877, respectively. A summons was taken out to amend the particulars, the ground taken being, that under the common counts a claim could not be made for wages not yet due.

J. B. Read showed cause.

Mr. Scott (Robinson & O'Brien) contra.

MR. DALTON held that the particulars were incorrect, and that the defendants were entitled to have them amended. An order was therefore made to amend the particulars by striking out the last two items, and inserting in their place a claim for salary from March, 1875, to the time when this suit commenced. Costs to be costs in the cause.

Chy. Cham.]

ONTARIO BANK v. SIRR.

[Chy. Cham.]

CHANCERY CHAMBERS.

ONTARIO BANK v. SIRR.

Re-sale—Order for deficiency—Set-off.

The purchaser at a sale under a decree, was by the decree declared entitled to an allowance for permanent improvements on the property. The purchaser died, and neither he nor his representatives having carried out the purchase, an order was made in the usual terms directing a re-sale and the payment of any deficiency by the administrator of the purchaser's estate. The lands were sold and realized less than the sum bid by the purchaser at the previous sale.

An order was granted allowing the amount of the deficiency on re-sale to be set off *pro tanto* against the amount found due by the report for improvements.

[November 11, 1875.—*Referee.*]

This was a suit instituted to set aside a deed made by William Sirr to the deceased defendant Alexander Sirr, on the ground that the same was made in fraud of creditors. By the decree made in the cause, the deed in question was declared fraudulent as against creditors, and the land ordered to be sold. The Master, however, was by the decree directed to make certain allowances to Alexander Sirr for permanent improvements, &c., and the amount so to be allowed was declared to be a first charge on the proceeds of the sale. A sale took place, Alexander Sirr became the purchaser and subsequently died. Neither he nor his representatives having carried out the purchase; an order was made in the usual terms directing a re-sale, and the payment of the deficiency by the administrator of his estate.

The lands were accordingly re-sold and realized considerably less than the amount bidden by Alexander Sirr. The amount found due to Alexander Sirr, in respect of his personal improvements, &c., was \$1,330.79. The deficiency on the re-sale, amounted to \$777.50. The total purchase money realized by the re-sale was \$1,350.

Under these circumstances, the plaintiffs applied for an order directing the amount due in respect of the deficiency to be set off *pro tanto*

against the amount allowed for the permanent improvements.

W. A. Foster, for the plaintiffs.

J. C. Hamilton, for the personal representatives of Alexander Sirr, resisted the motion on the ground that his estate was insolvent, that the claim for the deficiency against the estate, was a claim which should be paid *pari passu* with the claims of other creditors, and he urged that if the set-off claimed were allowed, the claim for the deficiency would be paid in full, in contravention of the provisions of 29 Vict. c. 28, s. 28; also, that the claims sought to be set off were not between the same parties: the claim due for the improvements was found due to the intestate himself, and the claim for the deficiency was a claim against the administrator only.

MR. HOLMESTED.—I do not think the argument of the administrator's solicitor can be sustained. The order directing the re-sale, did not direct the purchaser or his representatives to be discharged, it merely provided in a summary way the means of liquidating the liability of the deceased for the purchase money. The claim for the deficiency is not a new liability arising subsequently to the death of the intestate, but arises under the original contract of purchase made by Alexander Sirr in his lifetime. The deficiency is simply the balance of purchase money due on that purchase. If Alexander Sirr were living, there can be no doubt that the claims in question would have been set off. Can his death prevent it? I am of opinion that it cannot. The defendant's argument proceeds on the false assumption that set off and payment are convertible terms. If they were, one would expect to find that under the law as it formerly stood, giving priority to certain debts so long as a debt of superior degree remained unpaid, a debtor to the estate would be deprived of the right to set off a debt due to him of an inferior degree, because, if set off be synonymous with payment, he would be thereby getting payment

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ONTARIO BANK v. SIRR—CRAWFORD v. BOYD.

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of his debt of inferior degree in priority to a debt of superior degree; but there is no such doctrine to be found in the books, and I am unable to see that the statute which provides that all creditors shall be paid *pari passu*, has introduced any such rule.

The plaintiffs also claim that the amount of their costs should be set off against the amount found due to Alexander Sirr. The decree directs that in the event of the purchase money being insufficient to pay the amount found due to the plaintiff, the defendant, William Sirr, is to pay the deficiency; and it then directs that the amount of such deficiency to the extent of the costs taxed to the plaintiffs, shall be paid by both the said defendants Alexander Sirr and William Sirr. It does not appear that after setting off the \$775 against the amount found due to Alexander Sirr for the improvements, &c., that there will not be sufficient to satisfy the plaintiff's claim in full.

The order, therefore, will go, allowing the amount of the deficiency on the re-sale to be set off *pro tanto* against the amount found due by the defendant to Alexander Sirr for improvements, &c.

I think the costs should be costs in the cause to the plaintiff.

CRAWFORD v. BOYD.

Sale—Next friend of the party having the conduct of the suit being the highest bidder.

Where the person having the conduct of a sale under a decree of the Court is the highest bidder, and applies to be confirmed as the purchaser, the application will not be granted if any of the parties to the suit object.

The plaintiff had the conduct of a sale, and the next friend of the plaintiff was the highest bidder. The Master certified that by reason of the next friend having bid the sale was abortive. The certificate was not filed or confirmed. A motion by the plaintiff to confirm sale, notwithstanding the Master's certificate, was refused, as the guardian for the infant defendants objected, and an order for a re-sale was refused, because until the Master's certificate stood confirmed it was open to the parties to appeal from the certificate on the ground that the Master ought to have reported that the next friend was the purchaser; and because if the Master were right in finding the sale abortive no order for a re-sale was necessary.

[November 27, 1875.—Referee.]

The sale in this case took place on the 5th June, 1875, the next friend of the plaintiff,

who had the conduct of the sale, was the highest bidder. The Master by his certificate, dated 14th October, 1875, certified that the attempted sale had proved abortive by reason of the next friend of the plaintiff having been the highest bidder. This certificate was not filed or confirmed. By a subsequent certificate dated 12th November, 1875, the Master certified that he considered that the next friend was disentitled to bid at the sale.

N. W. Hoyles, for the plaintiff, on the 27th November, applied to confirm the sale to her next friend, notwithstanding the Master's certificate finding the sale to have been abortive, or for an order directing a re-sale.

J. S. Ewart appeared for the guardian of the infants, and insisted that there should be a re-sale, and that the next friend should be ordered to make good any deficiency, and also the costs of this application, and of the re-sale.

The other parties to the suit, with the exception of the defendant Pentland (who did not appear), consented to the plaintiff's application, and were willing that the next friend should be declared the purchaser.

MR. HOLMESTED.—Neither the solicitor for the plaintiff nor for the guardian *ad litem* have referred to any authorities, and I am therefore deprived of that assistance from their argument which I could have desired.

On the present application it is not open to me to review the decision of the Master at Kingston, finding that the sale was abortive, although I confess it does seem to me that where an unauthorized person is the highest bidder, the sale is not absolutely void, but only voidable on the application of those beneficially interested in the purchase money.

In *Elworthy v. Billing*, 10 Sim. 98, a defendant, not having obtained leave to bid, became the purchaser; but a motion by a co-defendant to have the property again put up for sale at the price bid by the defendant who had purchased was refused, but without costs, as the defendant had done wrong in bidding without first obtaining leave.

In *Nelthorpe v. Pennyman*, 14 Ves. 517, a solicitor in the cause bid without authority, in order to prevent the property being sold at an undervalue. He subsequently applied to be discharged from the purchase, but the Lord Chan-

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cellor refused the application, and held him to his bargain.

Where the person bidding without leave is the person having the conduct of the sale, a re-sale has been ordered, but without discharging the purchaser: thus, in *Sidny v. Ranger*, 12 Sim. 118, the plaintiff, a solicitor, having the conduct of the cause, became the purchaser under a feigned name, and the sale was confirmed, but the defendant subsequently discovering the facts connected with the purchase, applied to the court, and the property was ordered to be put up for sale again at the price at which the plaintiff had purchased it, and if there should be no higher bidder, the plaintiff was to be held to his purchase. The costs were reserved. The property was afterwards sold for double the sum bid by the plaintiff, and he was ordered to pay the costs. In that case the objection to the sale was not discovered until after it had been confirmed, in which respect, of course, it differs from the present case. But it appears to me the same principle must govern both, the wrongful purchaser is not entitled to be discharged, but may be held to his bargain if the parties interested insist on it. If the sale were absolutely void, there could be no ground for holding the plaintiff to his bargain, in case no higher bidder could be found, as was done in *Sidney v. Ranger*.

The question was discussed in the recent case of *Guest v. Smythe*, L. R. 5 Chy. 551. There Wight, a solicitor for certain parties who had two days before the sale taken out a summons returnable the day after the sale for leave to attend the proceedings, became the purchaser. The Master of the Rolls ordered the property to be put up again for sale at the amount Wight had bid; but Wight to be the purchaser if no higher bid obtained. On appeal that order was discharged, on the ground that Wight was not within the rule precluding solicitors in the cause from bidding, but Lord Justice Gifford in giving judgment, said, (p. 556): "It is of great importance that the rules of the Court on this subject shall be in no way relaxed. * * As regards the rules of this Court it is of course well known that a person who has the conduct of the sale under the direction of the Court, cannot himself buy, and of course it is equally well known that as he cannot buy, his solicitor cannot buy. It is equally well known that the parties to the suit cannot buy without the special leave of the Court; * and because they cannot buy, their

solicitor also cannot buy. There are also other well known rules, such as, that a trustee for sale, an assignee under a bankruptcy, or the solicitor of an assignee cannot buy; and generally speaking that where a man's duty and interest in respect of the purchase conflict, he cannot become a purchaser. If I thought that this case came within any of those well established rules, I should undoubtedly affirm the decision under appeal." Now the decision under appeal did not declare the sale void, but merely ordered a re-sale, with a proviso that Wight should be the purchaser, if no higher bid could be got.

In Daniell's Practice, 5th Ed., p. 1160, it is said: "If any party to the cause has, without obtaining previous leave to bid, been accepted at the auction as the highest bidder for any lot, he should as early as practicable after the sale apply by summons which should be served on the other parties to the cause, that notwithstanding he has not obtained such leave he may be certified to be the purchaser at the price he has bid at the auction, and unless special grounds are shown against the application it is usually granted." This application it is said should be made before the certificate of the result of the sale is signed. I think it is unfortunate that that practice has not been adopted in this case.

If the next friend were indeed disqualified from bidding, as to which point I am not called upon to express an opinion, the objection must rest on the ground that he has the conduct of the cause, or is a person standing in a fiduciary position. Now where a person having the conduct of the sale becomes the highest bidder, that fact alone is, I think, sufficient to entitle the other parties interested to have the property again put up for sale. It is very often impossible under such circumstances to show whether or not any actual damage to the sale has resulted, and it would be highly inexpedient to require parties coming to complain of a sale of that kind to establish that they had sustained damage; and where the person having the conduct of the sale is the highest bidder, and applies to be confirmed as the purchaser, I do not think the application should be granted if any of the parties to the suit object. If the plaintiff or her next friend applied before the sale for leave to bid, the application would only have been granted on the terms of her transferring the conduct of the sale to some other party. And where all parties desire leave to bid, the proper practice seems to be to appoint some independent solicitor to take the conduct of the sale:

*NOTE.—The practice in this country in this respect is different, see Order 381.—REP.

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see Daniell's Prac. 5th Ed., p. 1153. See, also, *Farmer v. Dean*, 32 Beav. 327; *Tennant v. Trenchard*, L. R. 4 Chy. 547.

To allow a party to retain the conduct of the sale and to become the purchaser, and after the sale to make an application of this kind, to be confirmed as purchaser, would, I think, open the door to an evasion of the well established rule of the Court, that the party having the conduct of the sale is debarred from becoming a bidder. So far as this application seeks to have the next friend confirmed as purchaser, it must be refused.

Neither do I think a re-sale can be ordered. At present any such order, if necessary, would be premature, inasmuch as the report finding the sale already attempted to have been abortive is not confirmed. Until the report is confirmed it is open to the infants to appeal from the Master's finding that the sale was abortive, and they may, as I have suggested, claim that the sale was not abortive, but that the Master should have reported the next friend to have been the purchaser, subject to their right to apply to have the property again put up for sale at the price bid by him (*a*). If the sale already attempted be abortive no order for re-sale is necessary : see *Sherwood v. Campbell*, 1 Chy. Ch. 299.

The guardian for the infants urged that the order for re-sale should be made on this application, holding the next friend to his purchase in case no higher bid could be obtained ; but I do not think as long as the report stands finding the sale abortive, that I can treat the sale as binding on the next friend. The Master finds that there was no sale. I cannot in the face of that say that the next friend must be held to his bargain in the event of no higher bid being obtained.

Neither do I think I can entertain this as a substantive application of the next friend to be allowed as purchaser. To entertain an application of that kind would be running counter to the decree which directs the land to be sold with the approbation of the Master at Kingston. I may add that it cannot be treated as an application to confirm a defective sale, because the Master reports that there has been no sale at all.

On the whole, therefore, I think the applica-

cation must be refused, with costs to the guardian.

Application refused.

RICHARDSON v. BILTON.

Dismissal for want of prosecution—Replication not due three weeks before the sittings.

Where the time for filing replication expires less than three weeks before the commencement of the sittings at the place where the venue is laid, the defendant cannot succeed on a motion to dismiss for not proceeding to a hearing at that sittings.

Sembie, it is not open to the plaintiff to countermand a notice of hearing once given.

[December 6, 1875.—*Referee.*]

Motion by defendants to dismiss.

The bill was filed on the 25th of August, 1875 ; the answer of defendant moving, on the 21st of September, 1875 ; the answer of a co-defendant on the 7th of October, 1875 ; replication on 18th of October, 1875.

Notice of hearing was given for the sittings held at London on 1st November, 1875, but this notice was countermanded on the 23rd of October, 1875, and the cause struck out at the request of the plaintiff by the Deputy Registrar.

John Taylor, for defendant.

H. Cassels (Blake, Kerr, & Boyd, for plaintiff.

MR. HOLMESTED.—Issue not having been joined three weeks before the last sittings, the plaintiff was not bound to proceed to a hearing at that sittings (Order 273, cl. 3), neither would it appear that he acted capriciously in withdrawing the cause after it had been set down. An attempt was made to examine the defendant now applying, but by reason of her having changed her residence, the plaintiff's solicitor was unable to find her to serve her with the subpoena, and he deemed it unsafe to proceed to a hearing until the examination should have taken place. I do not think the application can be brought within Order 276 ; I think, therefore, the motion must be refused with costs, as, according to my view, the plaintiff is not in default. For the purposes of this application, I think I must treat the matter as though the cause had not been set down at all. It does not appear to

(a) The guardian *ad litem* subsequently appealed from the report on sale on this ground, and the appeal was allowed by PROUDFOOT, V. C., without costs.

Chy. Cham.]

RICHARDSON v. BILTON—RE MOORE'S SETTLED ESTATE.

[Chy. Cham.

be very clear, however, that the plaintiff had the right to countermand the notice of hearing. If he had not, the defendant's course was to appear at the hearing and have the bill dismissed, as pointed out in *Jardine v. Hope*, 3 Chy. Ch. 197. See *Richardson v. Moser*, 1 Chy. Ch. 18; *Spawn v. Nelles*, Ib. 270; *Armour v. Noble*, 3 Chy. Ch. 99. In *Milne v. Lamon*, which came before Strong, V. C., at Whitby, the plaintiff had countermanded the notice of hearing shortly after the cause had been set down. Notwithstanding the countermand, the counsel for both parties appeared, and it was held that the plaintiff could not countermand the notice of hearing, and the Vice-Chancellor gave the defendant the costs of the day, and required the plaintiff to undertake to proceed to a hearing at the next sittings.*

Motion refused with costs.

RE MOORE'S SETTLED ESTATE.

Sale or mortgage of settled estate—28 Vict. c. 27, Imp. Act—19 & 20 Vict. c. 120 sec. 23.

The Court of Chancery has no power to order the sale of a portion of a settled estate, in order to raise money to make improvements upon the remainder.

The Court has no power to authorize a mortgage for that purpose.

[December 13, 1875.—*Proudfoot, V. C.*]

Application for the sale or mortgage of settled estate.

One William Moore died, leaving a will, by which he devised and bequeathed his property real and personal to the use of his wife, until the youngest of his children should attain the age of twenty-one years, or the testator's

* *Milne v. Lamon* came before STRONG, V.C., on the 19th of April, 1872. In that case notice of examination of witnesses and hearing had been countermanded on the 11th April, the sittings being on the 17th. The plaintiff's solicitor applied to the Deputy Registrar to strike out the clause from the hearing list, and he declining to do so, a Chamber order to the like effect was applied for. This was also refused. At the hearing, *Moss*, Q. C., appeared on behalf of the plaintiff, and *S. H. Blake*, Q. C., for defendant, and asked that the bill should be dismissed.

STRONG, V. C.—There is no practice of the Court which recognizes a countermand, and however desirable that there should be such a practice, it can only be established by a General Order. The case must stand over; the defendant to have his costs of the day, to be taxed on the principle that the defendant had a right to appear. The plaintiff must undertake to go down to a hearing at the next sittings.

—[REF.]

wife should die or marry, charged, [however, with the maintenance of the testator's three children. Upon the youngest child attaining the age of twenty-one the testator's property was by the will devised to his son, charged with payment of the value of one-sixth of the realty by the son to each of his sisters; and further charged with the support of the testator's wife. It appeared that the testator's executors (the widow of the testator and one George Street), had applied the personalty in payment of testamentary and funeral expenses; and the affidavit of the widow stated that the personalty was exhausted. It also appeared that the realty, consisting of a farm, had been rented for \$200 yearly, but the lease had now expired and the premises had become dilapidated, and that the sum of \$500 was required to place them in such repair that the farm could be again leased at the same rent.]

Fleming moved on petition for leave to sell a portion of the premises or to mortgage the whole in order to raise the money for effecting the necessary repairs.

PROUDFOOT, V. C.—I do not think I have power, under the Act, to direct the sale of a portion of the land to make improvements on the remainder: Imp. Act, 19 & 20 Vic. c. 120, s. 23; *Re Chambers*, 28 Beav. 653. Nor is there any authority for mortgaging for that purpose.

A lease might be made on such terms as to have the improvements made by the lessee; but if that is asked, an affidavit will be required from the other executor as to the personal estate being exhausted. I am inclined to be satisfied with that to save expense, but it should be full and precise.

Whether the Court has power to order a sale under its general jurisdiction, cannot be determined on this application.

Chy. Cham.]

RE SMITH—MCKENZIE v. SINTON.

[Chy. Cham.]

RE SMITH.

Sale of infant's estate—Sale "contrary to the provisions of the testator's will"—Con. Stat. U. C. cap. 12, secs. 50 and 51.

A testator by his will devised his property to his wife for life, and after her death to be divided equally amongst his children. The will further provided that the division should not take place until the youngest child attained the age of twenty-one years.

An application being made when the youngest child was only seven years old, for a sale of a portion of the land in order to pay off a mortgage on the whole:

Held, that an order for sale would be against the provisions of the will, and therefore in violation of sec. 51 of Con. Stat. U. C. cap. 12.

[December 15, 1875.—*Referee.*]

Petition under Con. Stat. U. C. cap. 12, sec. 50, for the sale of infant's estate.

The infant petitioners were entitled to certain lands in remainder under the will of their deceased father, whereby the lands in question were devised to their mother for life, and after her death to her children absolutely in equal proportions, share and share alike; and the testator provided by his will that if any of his children "shall previously die leaving issue then living, the share of the one so dead shall be divided equally among his or her children—that is, the share of the parent which he or she would have been entitled to if alive, shall belong to, and be equally divided among his or her issue." The will also contained the following clause: "The division of my said property under this will shall not take place until my youngest child attains the age of twenty-one years."

The mother was still alive; the youngest child was now only seven years old.

Part of the property affected by the will was mortgaged to one Drummond (apparently by the testator, though that fact did not very distinctly appear), and the present application was to obtain the sanction of the Court to a sale of a portion of the property in order to pay off the mortgage.

C. Moss, for the petitioners, referred to *Re Clark*. L. R. 1 Chy. 292, and *Re Spencer's Trust*, W. N. (1867) 268.

MR. HOLMESTED.—Under the will I think it clear that the land in question can not be sold until the youngest child shall attain twenty-one, and therefore a sale of the *corpus* now would be

a disposition contrary to the provisions of the will. Con. Stat. U. C. cap. 12, sec. 51, provides that "no sale, lease, or other disposition shall be made against the provisions of any will or any conveyance by which the estate has been devised or granted to the infant or for his use." The sale now sought to be made, therefore, would appear to be beyond the jurisdiction of the Court to sanction. *Re Callicott*, 1 Ch. R. 182, seems to be an authority against the application. *Re Clark*, L. R. 1 Chy. 292, and *Re Spencer*, W. N. 1867, 268, to which I have been referred, do not turn on this point. Those were applications to lease not to sell, and the only question raised in *Re Clark* was, whether all the parties who were interested in the fee, were before the Court; and, in *Re Spencer*, as to whether the Court had jurisdiction—the infants being entitled in remainder—there was no question in either case raised, as to whether the lease would be a disposition contrary to the provisions of the settlement or will under which the infants became entitled. I do not see, therefore, that they are any authorities in favour of the present application.

If the petitioners are dissatisfied with the conclusion I have arrived at, the matter may stand adjourned before a Judge.

Order refused.

The petitioners did not carry the matter further.

MCKENZIE v. SINTON.

Security for costs—Trust property.

A suit was brought to recover possession of certain lands, of which the plaintiffs claimed to be trustees, and to restrain the defendant, an overholding tenant, from committing waste. An order for security for costs had been obtained against the plaintiffs, by reason of their being out of the jurisdiction. The plaintiffs applied to discharge the order on the ground that they had property within the jurisdiction, and the property relied on was the property in question in this suit.

Held, that the plaintiffs not being entitled in their own right to the property, it did not constitute sufficient security for costs.

[December 15, 1875.—*Referee.*]

This suit was brought to recover possession of certain lands, to which the plaintiffs claimed to be entitled as trustees under the will of the late

Chy. Cham.]

McKENZIE v. SINTON—RE ADAMS.

[Chy. Cham.]

Thomas Sinton, and to restrain the defendant from committing waste.

According to the affidavits, it appeared that the defendant on the 18th March, 1861, conveyed the lot in question to the late Thomas Sinton, and that on the 26th May, 1870, Thomas Sinton leased the lot to the defendant for the term of five years ; and that the defendant was in possession as an over-holding tenant. An interim injunction had been granted on notice to the defendant.

The plaintiffs were resident out of the jurisdiction, and the usual order for security for costs had been obtained by the defendants.

A. J. Cattanach for the plaintiffs now applied to discharge this order on the ground that they had property within the jurisdiction, and the property they relied on, was the lot in question in this suit.

N. W. Hoyle, for the defendant. The defendant disputes the title of the plaintiffs to the property, and, in his affidavit filed in answer to the motion, states that he purchased the lands from one McTavish about thirty years ago, and has ever since been in possession; that he believes that he will be able to establish at the hearing his title to the lot as equitable owner thereof; that he believes he has a good defence to the suit on the merits. The plaintiffs, at all events, are not entitled to the property in their own right.

Mr. Holmested.—The affidavit of the defendant studiously avoids stating a single fact to show how he proposes to displace the *prima facie* case made by the plaintiffs, and does not in terms deny any of the facts alleged in the plaintiffs' affidavits; and I should be inclined to think his belief, that he will be able to establish that he is the equitable owner of the lands in question rests upon an exceedingly slender foundation.

At the same time, although I think that the plaintiffs will probably be able to make good their title to the land in dispute as trustees under the will of Thomas Sinton, I do not think in the face of the defendant's affidavit, that I can assume that that will surely be the case. The case differs from *Re Carroll*, 2 Chy. Cham. 305, in this respect, that there the right of the client to the fund in the solicitor's hand was not denied. There is, however, the further difficulty that the property relied on is not property to which the plaintiffs are entitled beneficially, but their

only right to it, if any, is simply as trustees. Any order for costs which might be made against them, would be against them individually, and not as trustees, and the defendant could not, on such an order, have execution against the trust estate ; not certainly without further proceedings, and even then it might be necessary to administer Thomas Sinton's estate, before the land in question could be made available for the defendant's costs : see *Higgins v. Manning*, 6 Pract. R. 147. There is no case that I am aware of, in which property held by plaintiffs as trustees, has been deemed a sufficient security for a defendant's costs, and for the reasons I have pointed out, I do not think that it would be a sufficient protection. Even though the plaintiffs may be really entitled to the land as they claim, yet they may neglect to prosecute the suit, and the bill may be dismissed for want of prosecution, or they may in the course of the cause be ordered to pay interlocutory costs to the defendant ; and I am at a loss to see how the land in question could be made available in equity for any costs so ordered to be paid by them.

I think the motion must therefore be refused with costs.

RE ADAMS, ADAMS v. MUIRHEAD.

Administration order.

Where the plaintiff was a beneficiary under the wills of I. and T., and the estate of I. had claims upon the estate of T., and the executors of I. were the administrators with the will annexed of the estate of T. : an order was granted for the administration of the estate of I., and the proceedings were consolidated with those under an order already obtained for the administration of the estate of T.

[December 20, 1875.—*Chancellor.*]

Motion for an administration order. The plaintiff was beneficially entitled under the will of Isabella Adams, widow of Thomas Adams, of which will the defendants were the executors. The plaintiff was also entitled under the will of Thomas Adams, of which will the defendants were administrators with the will annexed. The estate of Isabella had claims upon the estate of Thomas, and an order for the administration of Thomas's estate had been obtained, and his estate was being administered in the Master's office at Cobourg.

Chy. Cham.]

RE ADAMS—LEE v. MOFFATT.

[Chy. Cham.

The plaintiff desired by virtue of his interest in the estate of Isabella, to call the defendants to account in their character of administrators of the estate of Thomas, and also as executors of Isabella. He had attempted to do this in the Master's office, but had failed.

The bulk of the estate of Isabella consisted of property bequeathed to her by her husband.

Symons, for the plaintiff.

Hoyles, contra, for defendants.

SPRAGGE, C.—The plaintiff seems to me to be entitled to an order for the administration of the estate of Isabella, but such order, and the order already obtained, may well be consolidated. Isabella was the widow of Thomas, and the plaintiff's affidavit states that the bulk of her estate consists of property bequeathed to her by the will of her husband; the beneficiaries are the same (with an exception too trifling to be of any account—two sums of \$4), and the personal representatives are the same. The account of the two estates may properly be taken at the same time.

Order granted.

LEE v. MOFFATT.

Security for costs—Insolvent Act of 1875, 38 Vict. cap. 16, sec. 39.

In a suit by an insolvent to set aside an attachment as fraudulently issued, the assignee in Insolvency of the plaintiff having been made a defendant (although not a party to the alleged fraud), an order was granted under section 39 of the Insolvent Act of 1875, requiring the plaintiff to give security for the costs of the defendant, the assignee.

[Nov. 27, 1875.—*Referee*; Dec. 20, 1875.—*Chancellor*.]

The plaintiff in this suit was an insolvent against whom an attachment had issued which was still subsisting, and the defendants were the assignee in Insolvency, and two other persons with whom the insolvent had made business arrangements. One of these persons (the other it was alleged colluding with him) had sued out the writ of attachment, and it was alleged that the doing so was, under the circumstances, a fraud, and the bill prayed that the attachment

might be set aside, and for other relief. One of the defendants had obtained an order for security for costs under sec. 39 of the Insolvent Act of 1875, (38 Vict. c. 16).

On the 27th November, 1875, *Hoyles* for defendant Abbott, the assignee in Insolvency, moved for an order for security for costs under the same section 39. He referred to *Tredwell v. Byrch*, 1 Y. & C. Ex. 476.

Symons, for the plaintiff, contra. Section 39 does not apply to this defendant because he is the assignee in insolvency, and is not an "opposite party" (within the meaning of the Act) to whom security may be given. The section does not deny the Court the discretion to refuse security where it is not proper that it should be given.

MR. HOLMESTED, granted the order asked on the grounds that the attachment issued against the plaintiff not having been discharged, section 39 was peremptory.

The plaintiff appealed.

SPRAGGE, C.—It appears to me that, *prima facie*, a defendant to a suit by an insolvent has a right to an order for security for costs, but the plaintiff contended that the section does not apply to this defendant, because he is the assignee in insolvency of the plaintiff, and he points to the words "opposite party," to whom it is provided security should be given. The reasons given by the bill for coming to this Court instead of applying to the County Court Judge, and appealing from him if dissatisfied with his decision, as pointed out by the statute, I should incline to think, are not sufficient reasons: but whether sufficient or not, the plaintiff has made the assignee a defendant as interested in supporting proceedings which are impeached, or at least as entitled to support them, and so has made him an "opposite party" within the Act. The words are used to designate all against whom the insolvent after attachment or assignment issued, or before discharge obtained, "sues out any writ or institutes or continues any proceedings of any kind or nature whatsoever:" language sufficiently comprehensive to include the defendant who has obtained the order appealed from.

Appeal dismissed with costs.

C. L. Cham.]

IN RE ROSS.

[C. L. Cham.]

COMMON LAW CHAMBERS.

IN RE ROSS.

Custody of infant—Right of father—Religious education.

The father of the infant children (under twelve years of age) was a Protestant, and the mother a Roman Catholic. She left him, taking the children, alleging cruelty on his part, and they both made statements complaining of each other's conduct. The husband afterwards took the children from her, placed them in the care of a Presbyterian Minister (the respondent), and left the country, it was said, for a temporary purpose. On an application by the mother for the custody of the children, it was held, that she could not under the circumstances succeed against the father of the children; and therefore could not get an order against the respondent, his custody being that of the father.

[December 11, 1875, January 7, 1876.—Wilson, J.]

A summons was granted to Delina Alexander Ross, the mother of the infant children above named, on 19th October last, calling upon the Reverend Thomas MacPherson of the Village of Lancaster, in the County of Glengarry, to shew cause why he should not deliver to the petitioner, (the said wife) the said infant children who were under the age of twelve years, to remain in her custody until they should respectively attain the age of twelve years.

The petition filed shewed that she was married to David Ross on the 15th of November, 1861, at the City of Ottawa; that the husband and wife lived together until about the year 1872; and that for several years after the marriage, they lived together without any serious disagreement; and that the petitioner was before married to one Doucet, and had children by that marriage, which children David Ross, after his marriage with the petitioner, supported for several years: that the petitioner was of French parentage, and was brought up in the Roman Catholic faith, but she and Ross were married by a Baptist minister, and after the said marriage she in deference to the wishes of David Ross refrained from attending the Roman Catholic Church while she was living with him; although she sometimes attended Protestant places of worship she never became a Protestant, nor did she ever in any

way interfere with her husband as to his religious views or duties; that when her children by her first marriage were approaching years of maturity, David Ross began to drink to excess, and while inebriated exercised acts of cruelty and oppression towards her and her children; that he frequently threatened to kill her, and being in actual fear of her life, she left her said husband taking with her one child by her first marriage who was the only one then remaining at home, and the two children of her second marriage: that Lewis Olivier Ross was born on the 7th of November, 1869, and Alexander Ross, on the 12th of February, 1872, the two children of her present marriage: that when she removed her children as aforesaid in the fall of 1872, her husband did not molest her or her children until the spring of the year 1873, when he removed the children from her by force: that up to the time of the separation between her husband and herself they had resided in the town of Pembroke, and she continued to reside there afterwards for a time: that her husband after taking the children from her kept them in Pembroke during that summer; but in the autumn following he took the children away from Pembroke, out of the jurisdiction of the Court, to Lochaber in the Province of Quebec, and placed one of them in the care of his brother Alexander Ross, and the other in the care of his brother-in-law Daniel Pearson: that the conduct of her husband in separating her children from her preyed upon her mind and worried and harrassed her so that she became seriously ill, and was for two months confined to her bed and for a time her physicians expressed fears that she would not recover, and she was for several months weak and in delicate health, and unable to take any step to recover the possession of her children: that after her recovery she went to the Province of Quebec, and while she was there, first ascertained where her husband had placed her children; when she ascertained it she went to Lochaber to see them, was permitted to see them, but after her visit her husband and Alexander Ross wrote to her forbidding her to see them

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again : that about the month of June, 1874, believing her husband was determined to exclude her from the society of her children she went again to Lochaber to see them, and finding that the grown-up members of the family of the said Alexander Ross and David Pearson were absent from home she took the said children away from Lochaber, and took them to her own home in Hull : that about three days after she had returned to Hull with her children, her husband came to her house in Hull and compelled her to give the children up to him, and he took them away with him, and she was for a long time unable to gain any knowledge of where they were, but that about a month ago she learned that her husband had placed her children in charge of the Reverend Thomas MacPherson, a Presbyterian minister, at the Village of Lancaster, in the County of Glengarry, in this Province : that on the 28th of September, 1874, she went to Lancaster to see her children, and although at first Mrs. MacPherson denied that her children were in her care, and refused the petitioner access to them, she at last, on the petitioner persisting on seeing them, called the said Thomas MacPherson, who permitted the petitioner to see her children, but he refused, and still refuses to permit her to remove her children, and to have the care of them without an order from the Court or from the husband : that she handed to Mr. MacPherson a letter demanding her children, and threatening to take proceedings to compel him to give her up the children if he refused ; but Mr. MacPherson answered her as before stated, and he afterwards wrote her a letter to which she sent a letter in reply, but had received no answer : that her husband in the spring of the present year 1875, departed from this province, as she was informed, intending to go to California, having announced his intention never to return, and he has not since returned to this province : that her husband, soon after their separation, sold his property in Pembroke, and has not so far as she knows any property in this Province ; and he has made no provision for her, and has not contributed anything to it ; that she has maintained herself since his departure comfortably by her needle work, by keeping a small grocery, and by photography which she understands, and she is able and willing to maintain and educate her children by her own labor if she is permitted to have the custody of them, even if her husband should make no provision for them : that about a month ago she removed from Hull to the City of Ottawa, where she now resides, and where she is about to open a small

grocery for the profits of which, and by needle work, at which she is very expert she is confident she can maintain and educate her children better than they can be where they now are : that the children are tenderly attached to her and are anxious to be allowed to remain with her, and she is compelled to endure the utmost affliction under distress by being deprived of them : that she believes her husband is influenced not so much for the welfare of his children as by a desire to injure and distress her, and she fears if he become apprised in time of her intention to apply to this Court for an order for them, he will take steps to have them removed beyond the jurisdiction of the Court : that adultery has not been established against her by judgment in an action for criminal conversation with any one, nor has her husband or any one else, so far as she is aware, ever made any imputation on her conduct as a wife and mother.

The petitioner made and filed an affidavit of the truth of all the above matters.

Catherine Madden who made an affidavit for the petitioner, stated that she, the deponent, boarded with the petitioner at Pembroke in the summer of 1872 ; that she remembered David Ross threatening his wife's life, and she heard him say to his wife, "I'll blow your brains out," and she heard him fire off a pistol there once inside the house, and a second time outside the house ; that Ross was under the influence of liquor at the time, and the deponent was alarmed at his violence and feared he would kill his wife ; that the petitioner asked the deponent what she thought the petitioner should do, and she said she thought if she were in the petitioner's place she would be afraid to remain with the said Ross, and the petitioner left her husband the same day ; that the petitioner is a respectable woman and industrious, and looked well after her children ; that she has had a very good education, quite sufficient to make her a suitable guardian for her children ; that the deponent never heard one word of doubt as to her character, but on the contrary, she believes the petitioner to be a thoroughly amiable, moral, industrious, and upright woman.

Caroline Benoit a married daughter of the petitioner, also made an affidavit corroborating her mother's statements.

Noe Chevau made affidavit also as the petitioner's character, and as to her ability to support herself and her children.

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Cassels appeared for the respondent, and filed the following affidavits :—

The Reverend Thomas MacPherson, stated that he has been the Presbyterian minister at Lancaster, since 1843; that on or about the 19th of June, 1874, David Ross applied to the deponent to receive his two children, John and Alexander, for the purpose of having them brought up and educated in the Protestant faith along with the other members of the defendant's family, at the same time appointing him and Mrs. MacPherson the guardians of the children; that the children have since then resided with him and are quite happy and contented, and are satisfied to remain with the deponent, shewing every evidence of fear and dislike to the thought of removal from his house to the care of Mrs. Ross; that last October when Mrs. Ross visited the children, they did not for a considerable time recognize her, and when she asked them to go with her, the eldest refused, and the younger although saying nothing evinced no disposition to go with her, but on the contrary, every desire to remain in the deponent's care; that the deponent had since then frequently asked the children if they would like to go to her, and they always answered they would not, that she was not good to their father, and the eldest has often complained of cruelty on the part of his mother to himself, amongst other things, stating that whilst with her he did not get enough to eat; that the children are happy and contented as they now are, and every provision is made for their personal and spiritual welfare—the father having made all the necessary arrangements for their support and maintenance; that from correspondence with David Ross the deponent believed his absence was only temporary, and that he intends in a short time to resume the care of his children; that he had never refused since the visit of Mrs. Ross permission to see the children, and he has no objection to it now, excepting that he believes she will attempt to remove them by stealth from his care, she having attempted to bribe one of his servants to steal them.

John Angus stated that he was a brother-in-law of David Ross; that he had known him very intimately since 1861; that Ross was a steady, sober, and industrious man, and particularly fond of his family; that he was a Baptist, and attended that Church; that the petitioner was duly baptized into that Church in 1862 or 1863, and for several years she attended the church regularly; that David Ross frequently said to his wife he wanted his children and would have

them brought up in the Baptist faith and religion; that the petitioner had in 1866, two children, since deceased, of her marriage with David Ross, surreptitiously christened by a Roman Catholic priest, which fact was not known to her husband for several years after; and when he became aware of it, he was greatly annoyed thereat, although they were both dead before he was aware of their having been so christened; that he never heard her complain of her husband; that she is a woman of a very violent temper, and when in a rage or temper, is very dangerous. He has frequently seen her abuse her children in a very severe manner, by hitting them with rods and with her hands. He has frequently heard her cursing and swearing and using obscene and disgusting language in the presence of her children and strangers; that David Ross had told him that his wife when she left him the last time, took away with her \$40 or \$50 in money, besides carpets and furniture sufficient to furnish a good comfortable house; that about a month after she left her husband, she opened a small grocery store in Hull, where she did a very small business; that she has since gone to Ottawa; that while she was at Hull, he has heard from several parties, and he believes the same, that a woman of known disreputable character lived with her, and that a number of men visited the house during the nights; that she is not fit to have the charge of children; that she is not of means able to do so. He does not think she is worth \$50; that he was given a large sum by David Ross to invest and to apply the interest for the maintenance and support of the children—and he pays \$200 yearly to Mr. McPherson for that purpose; that David Ross is only temporarily absent, and he will return this fall or the following spring to his permanent home, which is in Canada; that the petitioner left her husband, as he told the deponent, without any cause; and he never saw David Ross under the influence of liquor; that David Ross is very strongly opposed to the children being brought up in the Roman Catholic faith; and the deponent believes if they are given to their mother, they will be brought up in that faith.

Ritchie supported the application.

WILSON, J.—There is a good deal of difference in the statements in the affidavits filed on the one side, from the statements which are made in the affidavits filed on the other side.

There is reason to believe that the difference of religion of husband and wife, notwithstanding the wife's formal conversion to or tacit accep-

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tance of her husband's church as her own, must have had something to do with the differences which led finally to a separation between them. The husband may have drank at times more than he should have done, and his wife may have received unkind, and perhaps harsh treatment from him at such times ; and he may have made threats of injury to her also while under the influence of drink ; but as a fact, he is not charged with having ever struck her, nor with usiug any other violence than it may be in words and firing off a pistol twice as before mentioned. Nor is there any neglect charged against him in refusing to supply her with all reasonable necessities, or in any other manner while they lived together.

It may be, too, that she was not always sufficiently considerate on her part—not so much so as she thinks she was ; and that from faults on both sides, although it may be more on the side of the husband than of the wife, they were quite ready to separate from each other.

It is well that the wife is so able to make her own living, for even if she took with her what it is said she did when she left her husband's house, the husband has not sufficiently provided for her. He has, however, provided very liberally for his children, and there is no cause to doubt of his anxiety to secure their comfort, training, and bringing up.

The father and mother having disagreed and parted, and the father having left the children of the marriage with persons to teach them and to rear them as members of the Protestant church ; and having made ample provision for that purpose, and these persons being able to do that which they have engaged with the father to do—and doing it well and kindly, and being desirous of continuing their work as teachers and as guardians—and the children themselves being happy and satisfied, can I, with any propriety, because the father is absent from the country, deliver these children from the custody in which the father has placed them, into the custody of the mother, although she may be well able to maintain and educate them ?

I do not desire to touch upon the religious question which there is reason to believe does exist in this case between the father and the mother of the children, because it is always a delicate matter to deal fairly with, even when it must be taken into consideration and cannot be avoided, and because I conceive this application can be disposed of without touching upon such a question at all.

The general rule is, not only that the father is entitled to the custody of his children, but that he is entitled to have them brought up in and taught the tenets of the Church to which he belongs if he desire it. I need only refer to the last case I have seen on the subject, and to which reference was made on the argument : *Andrews v. Salt*, L. R. 8 Ch. 622 ; *In re Andrews*, L. R. 8 Q. B. 153.

This application is made under the Con. Stat. U. C. ch. 74. That statute does not alter the father's general and common law right to have the care and custody of his children. It gives the Courts larger powers than they before possessed to remove the children to the mother's custody upon a proper case for relief being made out.

I cannot, on the facts before me, charge cruelty against the husband. It may be he has deserted his wife, but I cannot say properly on the knowledge I have, whether he is wholly in fault or not. He has unquestionably provided well for the children in all respects for their bodily comforts, and for their education and bringing up. I do not think it is necessary to remove them from their present abode ; and I think it would not be beneficial in any manner for them that they should be so removed. The custody of the respondent in whose care the father has placed his children, is the custody of the father.

I do not deny, nor can I avoid feeling the unhappiness this order may occasion to the mother in excluding her from the bringing up of her own children when she is willing and able as she says to do so, and when their father has left the country, and they are in the hands of a stranger to them in blood. But the like misery is a consequence to one or other of the parents in every case of a separation between them, for they cannot both have the children.

That they should be brought up Protestants, as the father desired they should be, is no more than his right to decide such a matter for them, and is no more than the mother, by her actual conversion to or acquiescence in being considered a member of her husband's church, knew all along was the purpose of the father—and knew also that her husband must have believed she concurred in.

Upon a full consideration of all the facts, omitting the religious question, I am of opinion I should not make the order for removal of the children into the custody of the mother. I may add, I am not satisfied the husband has perma-

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nently left the country or abandoned his children. If I had to consider the religious question as well, I should more strongly decline to make the order, for I should entertain a strong belief that the purpose of the Protestant father to bring up his children, born, as he had reason to believe at the time, by a Protestant mother also, would be wholly defeated. I do not say, nor do I think, it would be done wantonly and in a vexatious spirit by the wife to annoy her husband. It would be done, I have no doubt, if done at all, from a belief entertained by the mother that it would be for their spiritual as well as their temporal happiness. But it so happens that she has not alone the right to judge in such a case.

I must discharge the summons, but I shall make an order, if it is desired, providing for the mother's access to the children at such stated times as may be convenient and necessary, if the parties cannot agree upon it among themselves.

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Insolvent Act, 1875, secs. 9, 14, 18, and from B.—Description of parties—Entitling affidavits—Setting aside attachment.

Semblé, that the omission to describe the parties in the entitling of an affidavit under above enactment, is not a fatal objection if the description appears in the body of the affidavit :

Held, 1. That the omission to state in the creditor's affidavit, under sec. 9, that the defendant owed him not less than \$200 "over and above the value of any security which he holds for the same," is a fatal defect. This statement is part of the creditor's case.

2. A debtor when applying under sec. 18 for relief from attachment proceedings against him, can except to the creditor's case on the face of it, as well as shew by contra evidence that it is not maintainable.

3. And if he can shew that the writ never should have issued, he is entitled not only to have the attachment made under a writ set aside, but also the writ itself, in like manner as a creditor is entitled under sec. 14.

[November 30, 1875; January 7, 1876.—Wilson, J.]

Appeal from the decision of His Honor W. W. Dean, Judge of the County Court of the County of Victoria, in insolvency. The question turned on the sufficiency of the affidavit made by the petitioning creditor for a writ of attachment against the debtor. The affidavit began as follows :

"Insolvent Act of 1875.

CANADA, } JOHN McDONALD,
Province of Ontario, } v. Plaintiff.
County of Victoria. } ROBERT CLELAND,
Defendant

I, John McDonald, of the Township of Eldon, in the County of Victoria, yeoman, being duly sworn, depose and say :

1. I am the plaintiff in this case.

2. The defendant is indebted to me, by judgment recovered by me against him at the last sitting of Assize and *prisi prius* held at Lindsay, in said County of Victoria, on the sixth day of October last past, for one thousand, six hundred and fifty-six dollars and fifteen cents, being an instalment of mortgage made by him to me, falling due on the first day of July last past, together with interest, costs of suit, and subsequent costs of suits of *fieri facias* issued upon the said judgment."

The plaintiff then set out three reasons for believing the defendant to be insolvent :

1. That he had been selling and disposing of his goods for considerably less than their fair value, and has been attempting to sell his saw logs which, as a lumber manufacturer, he would not do before converting them into sawn lumber.

2. Five days before the plaintiff caused writs of *fieri facias* to be issued on his judgment, one John Cleland, who, the plaintiff believes, is a representative of the defendant, placed in the hands of the sheriff of Victoria a writ of *fieri facias* at his suit against the goods of the defendant for upwards of \$8,000, which the plaintiff believed was obtained through the fraud and allusion of the said John Cleland and the defendant, and which writ is still in force.

3. That he believed the defendant had procured his goods to be seized and levied on ; and his goods had been advertised for sale by the sheriff under the said writ.

The defendant was a lumber manufacturer. There were other two affidavits styled in like manner as the plaintiff's affidavit. A *fiat* for attachment and the attachment thereon were issued against the defendant.

The defendant petitioned the Judge to rescind and set aside the *fiat* and the attachment, because—

1. The affidavits were improperly styled, in that they do not, in the style of cause, shew the residence and description of the parties, as required by the Act.

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2. They do not shew that the plaintiff was a creditor of the defendant in a sum of not less than \$200 over and above the value of any security which he held for the same, as required by sec. 18 of the Act. And that the plaintiff was not a creditor of the defendant in a sum provable in insolvency of not less than \$200 over and above the value of any security he hold for the same ; but on the contrary, the plaintiff held security for his debt of far greater value than his said debt.

The defendant filed an affidavit, stating that he bought a mill property and timber limits from the plaintiff in February, 1874, for \$8,625, secured by mortgage upon the property. That he paid the plaintiff \$4,000. That the sum of \$1,625, due on July last, he has not paid. That the property is now, notwithstanding depreciation in value, worth at least \$5,200 ; and the defendant has lately refused \$6,000 for it and for about \$800 worth of saw logs, because the offer was not for cash, but property in the city of Toronto. He denied, moreover, that John Cleland's judgment and execution were fraudulent. They represented, he said, an honest debt.

The Judge ordered that the *fiat* the Deputy Judge had granted, and the writ of attachment which was issued upon it, and all other proceedings under the writ should be set aside, and rescinded with costs, to be paid by the plaintiff to the defendant, and that the defendant should bring no action.

The following was the judgment delivered by the learned Judge of the County Court : — “This is an application upon the petition of the defendant to set aside an order of the Deputy Judge for a writ of attachment, and all proceedings subsequent thereto in this matter, upon the ground, amongst other, that the affidavit on which the order was made did not shew that the defendant was indebted to the plaintiff in a sum provable in insolvency of not less than \$200, over and above the value of any security which he holds for the same. It was contended on behalf of the plaintiff that the only grounds on which a defendant can, in any case, apply to have an attachment set aside were those set out in sec. 18 of the Act ; and no matter by what wrongful or improper means a plaintiff may get an order for a writ of attachment, it cannot be set aside as orders for other process may be, because based on insufficient materials. I do not think that the plaintiff's contention is correct. I see no reason why a Judge of this Court has not quite as much authority over its orders

and process as a Judge of any other Court would have over the orders and process of that Court. I think that sec. 18 contemplates the case of a defendant who has been regularly, and so far as the materials on which the order was made, properly put into insolvency, and was not intended to meet a case where an order had been made upon affidavits, which, on their face, were insufficient. The plaintiff seeks to strengthen his contention by reference to sec. 14, which says that the writ of attachment may be set aside and annulled for a substantial insufficiency in the affidavit required by sec. 9 on summary petition of any creditor, &c., and argues from this that only a creditor can take advantage of a substantial insufficiency in the affidavit. It seems to me that this inference is not justified by sec. 14. It extends the right of application to a creditor ; without it he would not be able to make such an application, although he might believe this debtor was perfectly solvent, and was in collusion with the attaching creditor. It cannot be said this takes away the right from the debtor. The question then is, was the affidavit sufficient to justify the order. Sec. 9 says : “ Any creditor, upon his affidavit, or that of his clerk or other duly authorized agent, that a trader is indebted to him in a sum provable in insolvency of not less than \$200, over and above the value of any security which he holds for the same, and provided the affidavit or affidavits filed disclose such facts or circumstances as shall satisfy the Judge that such trader is insolvent.” There are two things that must be shewn by the affidavits before the Judge can make the order—first, the plaintiff must be a creditor for not less than \$200, over and above the value of any security which he holds ; and second, the debtor must be shewn to be insolvent. Both these facts must be equally proved, neither must be left to be inferred. A debtor may be shewn to owe large sums ; but this is not sufficient unless it also appears that he is not able to pay them, or has done or allowed that which, by the Act, makes him insolvent. Equally so, the creditor might have a large claim against the debtor, but it is not to be inferred that the debt is not secured ; the creditor does not shew that he is enabled to put the debtor into insolvency, unless it is sworn that at least \$200 of the debt is unsecured ; both the letter and the spirit of the Act requires this. The plaintiff further contends that the attachment made under the writ could only be set aside as provided by sec. 18 ; but I think this application is not made under that section, but rather upon the general principle, that an order made on insufficient material cannot stand ; and

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if the order falls, every thing done under it must fall also. I think that on this ground the order, the writ of attachment, and the attachment made under it, must be set aside."

The plaintiff appealed from this judgment for the following reasons :

1. That under the Insolvent Act of 1875 the Judge had no power to set aside a writ of attachment on the petition of the insolvent himself.

2. That his jurisdiction as to setting aside the writ or assignment made is limited to cases in which a creditor (not the insolvent) petitions within the time, and on the ground specified in the 14th section of the Act.

3. That his jurisdiction is limited, on the petition of the insolvent, to setting aside the attachment made under the writ, not the writ itself, as provided in sec. 18 of the Act, on the grounds in that section set forth, and conformably to the evidence on those grounds adduced before him, and not merely on the material on which the writ issued, to which latter sec. 14 specially applies.

4. That if his jurisdiction under sec. 18 extends to setting aside the writ of attachment, and not merely the attachment made under the writ, the petition should have been grounded on that section, and before such setting aside evidence on said grounds should have been heard before him ; whereas in this case no such evidence was heard, and the petition of the insolvent, which could be only under sec. 18, was sustained on the grounds of a creditor's petition, under sec. 14 of the Act, which the plaintiff contends are not available to the insolvent.

5. That only a creditor is entitled to apply to set aside the writ of attachment on the grounds set out in the same petition, as provided in section 14 of the Act.

6. That the affidavits objected to are sufficient whether attacked by a creditor or by the insolvent, on petition under said Act, and that, as set out in section 18, the insolvent is not entitled to ground an objection on their insufficiency.

On the 30th of November the case was argued before Wilson, J.

Osler for the appellant. The affidavit of the plaintiff does not in the entitling describe the parties by their residence and description according to form "B" in the schedule of the Act of 1875 ; but so far as the plaintiff is con-

cerned, that purpose is sufficiently answered by his name and residence and description being fully given in the beginning of his affidavit. The defendant is not so described according to form "B," but that is not a reason for vacating the proceedings at the debtor's instance, as afterwards shewn. The affidavit does not, according to section 9 of the Act, state that the defendant is indebted to the plaintiff in a sum proveable in insolvency of not less than \$200 over and above the value of any security which he holds for the same ;" but it is in that respect according to form "B," which does not contain such a statement.

If that be an objection, it is not one which the defendant can take to have the attachment set aside.

Under sec. 14, a creditor to the amount of not less than \$100 beyond the amount of any security he holds, may apply to set aside or annul the writ of attachment for want of or for a substantial insufficiency on on the affidavit required by sec. 9 ; and by sec. 18 the insolvent may apply to set aside the attachment made under such writ, on the ground that the party at whose suit the writ has issued has no claim against him ; or that his claim does not amount to \$200 beyond the value of any security which he holds, &c. ; and such petition shall be heard and determined by the Judge in a summary manner and conformably to the evidence adduced before him thereon.

These enactments shew that there is a difference between setting aside and annulling the writ of attachment, which can only be done at the instance of a creditor, and setting aside of the attachment made under such writ, which may be done at the instance of the insolvent.

The 18th section also shews that the insolvent cannot object to the insufficiency of the affidavit in any respect. He may object as a fact that the plaintiff has not a claim against him at all ; or that the claim does not amount to \$200 beyond the the amount of security he holds, &c., in which case the Judge shall hear and determine the matter "conformably to the evidence adduced before him." If the Judge decide in favour of the defendant upon the facts—but not upon the insufficiency of the affidavit—he may set aside "the attachment made under the writ," and the seizure of the defendant's goods, but not the writ itself. As the Judge has gone beyond his power in that respect, the appeal should be disallowed.

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Clarke, contra. The intituling of the affidavit is defective according to the directions of the form given in the schedule.

There is no reason why the forms should not be followed; and there may be a good reason for requiring it, because, by sec. 11, the assignee is to give notice of the issuing of the writ by advertisement in the form D in the schedule, which gives the intituling of the suit; and it is important that not only the names of the parties, but their residences, and descriptions should be also given in order that the necessary information may be given to persons who are interested in the proceeding; and the assignee may not be able to give such information if the affidavit do not embrace it.

The chief question is, whether the affidavit is sufficient when it omits the allegation that the defendant is indebted to the plaintiff in a sum not less than \$200 "over and above the value of any security which the plaintiff holds for the same." Sec. 9 requires that fact to be stated. Sec. 106 shews that that fact must be disclosed in the affidavit, for he may also specify the value of such security in that affidavit. Creditors who hold security cannot prove their debts without giving up the security, or putting a value upon it: sec. 84. If the plaintiff's case be not properly established, the Judge may set aside the writ as well as the attachment under it.

The omission to describe both the plaintiff and the defendant in the intituling of the affidavit by their "residences and descriptions," as well as by their names; and the omission to describe the defendant by his residence in part of the body of the affidavit, is objectionable, although the requirement is contained only in the form B given in the schedule, and not in the body of sec. 9 of the Act.

WILSON, J.—I am not disposed to hold that the mere omission to describe the parties in the intituling as an objection, if they are sufficiently described in the body of the affidavit, and if it plainly appear they are the same parties whose names are in the intituling. Here, for instance, John McDonald is called plaintiff in the intituling, and the affidavit then proceeds: "I, John McDonald, of the Township of Eldon, in the County of Victoria, yeoman, being duly sworn, depose and say: I am the plaintiff in this cause." Now, that is, in my opinion, plainly sufficient. But Robert Cleland, although called defendant in the intituling, and although he is called a lumber manufacturer in the body of the

affidavit, is nowhere described as to his residence throughout the affidavit.

I think the omission of such a matter from the affidavit is plainly an irregularity, and perhaps it is something more; but I am not prepared to say it is. The writ of attachment is not required to designate the parties by their names, residences, and descriptions; and the notice which the official assignee advertises of his having got such a writ does not so designate them either; and perhaps the assignee can do no more than specify them in the notice as they are represented in the writ. He does not see the affidavit which does, or which should describe them, &c., and so their particular designation in the affidavit can be no guide to him in his designation of them in his notice.

A creditor under sec. 14 may have the proceedings set aside "for a substantial insufficiency in the affidavit." I think such a person could not raise the objection taken here, so long as the insolvent did not complain of it. Can the debtor do so? He, if any one, is, I think, the only person who can do so; and perhaps he can, as it is a statutory enactment, and not the non-observance of a rule of Court: *Ex parte King*, L. R. 7 C. P. 94.

Under the English Bill of Sales Act, unless the description of the residence and occupation of the person giving the bill of sale be stated in the bill of sale, it is void; and such an omission was accordingly held to be a fatal objection: *Hatton v. English*, 7 E. & B. 94.

The case of *Banbury v. White*, 2 H. & C. 300, shews that the description of a person may be made out in an affidavit if it refers to the bill of sale. But the reference must be of so precise a nature that not only must he identify himself as the person who is named in the bill of sale, but he must shew also that the description there given of him is his true description. If the affidavit fail in that respect, the bill of sale is void: *Brodrick v. Scale*, L. R. 6 C. P. 98.

I do not think it necessary to decide positively on the point of the alleged defective intituling as to the omission of the residence and description of the parties.

The next objection is, that the plaintiff in his affidavit had omitted to state that the defendant owed him not less than \$200 "over and above the value of any security which he holds for the same." This is a fatal omission, and in this case it is especially objectionable, because the plaintiff

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holds a mortgage against the defendant for the balance of the purchase money of the property he had sold to the defendant, and for which the debt in question is a part; and he probably could not make the affidavit which was required to constitute the defendant an insolvent. He certainly has filed no affidavit in the Court below in answer to the defendant's affidavit that the mortgage he holds is more than a full security for the balance now due upon or secured by it.

I think the plaintiff's counsel did not so strongly contend that the affidavit was sufficient, as he did, that even assuming it was not so, the Judge had no power to set aside the writ of attachment itself, but only the attachment made under the writ. The latter are certainly the words used in the 18th sec., on a motion by the defendant for relief against the proceedings which are being taken against him. While under the 14th sec., when a creditor applies to vacate the proceedings, the Judge may set aside the writ itself. Is there any difference in reality in the relief intended to be given in the two cases according as the application may be by a creditor or by the insolvent himself?

Where a creditor applies, he may have the writ of attachment set aside or annulled for want of, or for a substantial insufficiency in, the affidavit required by sec. 9. I should think he could do so also on the ground of collusion between the debtor and petitioning creditor, although sec. 14 does not say so: see sec. 9.

Where the debtor applies for relief against the proceedings under sec. 18, it may be granted to him in the following cases:

1. Where the party at whose suit the writ was issued had no claim against him.
2. Or his claim does not amount to \$200 beyond the value of any security which he holds.
3. Or is not provable in insolvency.
4. Or that his estate has not become subject to liquidation.

These, probably are matters which the debtor must, in most cases, shew by counter affidavits, as it is not likely that the petitioning creditor's own affidavit would show he had no claim against the insolvent, &c.

However, upon the debtor satisfying the Judge that the creditor had no claim against him, what relief is he to have? The plaintiff says, only to have the attachment made under the writ removed from his goods and effects; but the writ itself is not to be set aside. But why

not? The plaintiff says again, because the statute says so. It does say so; but what is the meaning of it? Can it be, that if the creditor has no claim, that the writ is still to remain standing against the defendant?

In *Prentice v. Harrison*, 4 Q. B. 852-857, Pateson, J., in speaking of writs of execution, and the proceedings upon them being set aside by the Court, on motion said: "And we constantly do set them aside in that way, though perhaps in strictness we should only set aside the execution." By the *execution* I understand is meant the acts done under the writ, and not the writ itself.

I do not see why the writ of attachment should remain if there be no debtor, unless it be for the purpose of protecting those who have acted under it, and because it was supposed to be necessary it should remain as a protection for that cause. If the like rule apply to the assignee who seized under the writ, which applies to the sheriff who seizes under an execution, the assignee will be protected even although the writ be set aside: *Ives v. Lucas*, 1 C. & P. 7; *Woolley v. Clark*, 5 B. & A. 744, 746, per Best, J.; *Jones v. Williams*, 8 M. & W. 349-356, per Parke, B., and I do not see why it does not apply.

But why should the writ stand for the protection of any one when the insolvent applies, when it does not stand when a creditor applies. If it is necessary, that it should be a protection in the one case, it is just as necessary that it should be in the other. And if it is not made a protection in the one case, nor necessary to be so made, it need not be so in the other case.

Notwithstanding the difference in the language of the two sections, I think the Judge may, at the instance of the debtor, as well as of a creditor, set aside the writ of attachment itself for any of the causes specified in the 18th section.

But it is further said by the plaintiff that the section referred to does not, as the 14th section does, give the debtor the right to apply for relief "for want of, or for a substantial insufficiency in the affidavit." Sec. 18 does not do so in terms, but it does give the debtor the right to apply when there is no debt owing, or when there is no debt of \$200 over and above the security which the creditor holds for it.

The defendant says that the plaintiff's own affidavit shews sufficient for the defendant's purpose, because it does not negative the fact of

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security, which the Act specially requires he shall negative, and that no affidavit of his can be required to shew the affirmative.

I think the debtor can apply when there is a substantial insufficiency in the petitioning creditor's affidavit, as in this case, and that he certainly could also apply "for want" of an affidavit altogether, although the 18th section does not provide for it, as well as a creditor can under the 14th section.

In my opinion the debtor can except to the creditor's case on the face of it, as well as show by counter evidence that it is not maintainable; and in either case, if he show that the writ never should have issued, he is entitled to have it set aside, and not merely the attachment made under it removed from his goods and effects.

I must dismiss the appeal with costs.

METROPOLITAN BUILDING AND SAVINGS SOCIETY v. RODDEN.

Ejectment—Defence for time—Striking out.

Ejectment on mortgage. Defendant appeared; but on examination under A. J. Act, 1873, he admitted the execution of the mortgage, and that the defence was merely for time. Held, that the appearance and defence could not be struck out on the authority of *McMaster v. Beattie*, 10 C. L. J. 103, as defendant was entitled to possession until plaintiff should prove his case.

[January 8, 1876.—*Mr. Dalton.*]

In this case title was claimed by the plaintiff by virtue of a mortgage, in the proviso for redemption of which default had been made. The defendant appeared, and defended for the whole of the lands claimed. He was subsequently examined under the Administration of Justice Act, when he admitted his execution of the mortgage and default in payment, and stated that he had no *bona fide* defence against the plaintiffs, and had only defended the action in order to gain time, and to enable certain other parties to realize their claims on the lands.

Application was thereupon made in Chambers to strike out the defendant's appearance and notice of defence, on the ground that this was a case in which the same principle would apply as in *McMaster v. Beattie*, 10 C. L. J. 103, and subsequent cases, were pleas pleaded

merely for time, and admitted in a proceeding in the cause to be false in fact, were struck out, and leave given to enter final judgment.

MR. DALTON.—I do not think I have power to grant anything which would assist the plaintiffs in the present case. It is true that similar applications have been granted occasionally, and probably no injustice has as yet been done in this way, but my opinion is, that I have no jurisdiction in this matter. An equitable defence in ejectment might be struck out if proved to be false or embarrassing, but a defendant who appears has a right to remain in possession until the plaintiff proves his title, and his admissions under examination do not deprive him of this right.

Summons refused.

MEEHAN v. WALSH.

Notice of trial—Amendment—A. J. Act, 1873.

Notice of trial was given by mistake for the 11th January, instead of 10th January. The defendant did not appear to have been misled. Held, that the plaintiff might amend under the A. J. Act, 1873.

[January 10, 1876.—*Mr. Dalton.*]

Notice of trial had been served on January 3rd for the 11th instead of the 10th of the same month. A summons was obtained calling on the defendant to show cause why the notice should not be amended by changing the date to the 10th.

Murphy showed cause. This is not a case in which amendment should be allowed. A defendant would be justified in paying no attention to such a notice, and he should not therefore be forced to go to trial when he might not have made preparation, relying on his opponent's irregularity.

Mr. Keefer (Hodgins & Black), contra. It is shown that the plaintiff's attorney had made inquiry, and was under a *bona fide* belief that the Commission day was the 11th January. It was well known among the profession that the Assizes would commence about that time, and the defendant could not have been misled. The motion to amend had been made as soon as the plaintiff became aware of the mistake: *Graham v. Brennan*, 11 Irish L. R. App., p. 17.

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MR. DALTON remarked that in granting this and other applications of the same kind, which had been made lately, a new practice might seem to be instituted, but he thought this was a case in which the powers of amendment granted by the Administration of Justice Act might properly be exercised. Before the passing of that Act, no such application could have been granted. Now, however, it is enacted that no proceeding at law shall be defeated by any formal objection, and he, therefore, thought that he was justified in making this summons absolute. The proper county was named in the notice, it was correct in every respect except the date, and it was scarcely possible that it could have misled the defendant.

The summons must be made absolute on payment by the plaintiff of the costs of the application.

Order accordingly.

FAGAN v. WILSON.

Transmission of depositions—Certified copies.

Held, that sec. 193 of C. L. P. Act permits the transmission of certified copies of depositions; an application to transmit the originals was therefore refused.

[January 12, 1876.—*Mr. Dalton.*]

W. R. Mulock, applied for an order to transmit original depositions to the clerk of assize, to be used as evidence in a case then pending.

The ground on which the application was made was, that certified copies of depositions were not admissible as evidence under C. L. P. Act s. 193, which enacts that “examinations and depositions certified under the hand of the Judge, or other officer or persons taking the same, shall without proof of the signature be received and read in evidence.” Reference was made to an unreported case in which it was said that STRONG, J., had held that this section did not permit the use of certified copies as evidence. The same view is taken in the note in Harr. C. L. P. Act, p. 270.

MR. DALTON—The object of the section seems to have been simply to provide that depositions should be admissible as evidence at a trial, without reference to the question whether they were original, or not. It is greatly to be desired that there should be an authoritative decision on the

point. In my opinion it would be quite sufficient to produce the certified copies at the trial. In *Flett v. Perrins*, L. R. 3 Q. B. 536, an examined copy of answers to interrogatories was received in evidence in a different suit from that in which they were originally taken. I must refuse the order.*

Order refused.

TURNER v. NEILL.

Examination of defendant—Striking out false plea.

[January 25, 1876—*Mr. Dalton.*]

In this case a summons was obtained to strike out the defendant’s plea, as proved to be false by his examination under the Administration of Justice Act.

MR. DALTON declined to strike out the plea, although he thought there could be little doubt that it was false. It involved a point which required evidence for its establishment in addition to defendant’s admissions, and no matter how clear the case might be, he had not power to strike out the plea unless the defendant, in a proceeding of the Court, admitted it to be false. Costs to be costs in the cause.

Summons discharged.

WRIGHT v. WRIGHT.

Bills and notes—Renewal—Statute of Limitations—Pleadings.

Action on a promissory note. Plea, no consideration, as it was given in renewal of another note in which plaintiff’s remedy was barred by the Statute of Limitations

Held, that such a plea constituted no defence.

[February 6, 1876—*Mr. Dalton.*]

Declaration on a promissory note. Plea that there was no consideration for the note, since it

* Mr. Harrison in his note says: “The meaning cannot be, that office copies given out should be certified by the Judge, or other officer or person taking the same; for the officer takes the original examination or depositions, and not office copies.” The wording of the section seems conclusive that the learned annotator and Mr. Justice Strong, were correct in their view. It might be desirable to permit certified copies to be used, but the section as it stands does not seem to contemplate it.—*REP.*]

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was given as a renewal of another note in which the plaintiff's remedy was barred by the Statute of Limitations.

Summons to strike out this plea.

MR. DALTON.—The plea must be struck out. I must follow the case of *Austin v. Gordon*, 32 U. C. Q. B. 621, in which it was held that a debt for which a discharge had been given in insolvency was a continuing debt in conscience, and was, therefore, a sufficient consideration for a promise to pay.

Order accordingly.

RICHARDSON V. SHAW.

Interpleader—Jurisdiction—Prohibition—Waiver.

Where a Judge makes an order, which, though possibly erroneous in itself, is made at the request of one of the parties and is acted upon, a prohibition at the request of such party will be refused.

[February 9, 1876—*Gwynne, J.*]

The defendants, Shaw & Campbell, obtained judgment against one George Richardson, in 1874, for £339.98 damages and costs, in the County Court of the County of York, and issued execution directed to the Sheriff of Hastings. The sheriff seized certain goods and chattels in the possession of said Richardson, which the plaintiff Ellen Richardson, claimed. An interpleader issue was directed to be tried at Toronto by the Judge of the County Court of York, which issue was afterwards ordered by the said Judge to be tried before the Judge of the County Court of Hastings, by consent of all parties. The issue was tried by the Judge of the County Court of Hastings, and verdict given in favour of the claimant, the plaintiff. The plaintiff afterwards obtained an order from the Judge of the County Court of York for the payment of costs by the defendants, and signed judgment and issued execution.

A summons was thereupon obtained, calling on the County Judge of York and the plaintiff to show cause why a writ of prohibition should not issue to restrain further proceedings.

Osler shewed cause, and contended that as the interpleader order was obtained by defendants, and subsequent proceedings had been taken by

the defendants, they could not succeed in this application.

D. B. Read, Q.C., contra, relied on *Nicholls v. Lundy*, 16 U. C. C. P. 160, and the cases there cited.

Gwynne, J.—Judge Willes, in pronouncing the judgment of the Judges to the House of Lords, in *The Mayor of London v. Cox*, L. R. 2 E. & I. Ap. at p. 282, says: “There is indeed a distinction, after sentence, between a patent and a suggested defect, for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior Court, and is defeated, then, if the defect be of power to try the particular issue only (*defectus triationis*, as it has been called), the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause (*defectus jurisdictionis*), and that defect be apparent upon the proceedings, a prohibition goes after sentence.” This would seem to be applicable if the order which is assailed here as being in excess of jurisdiction had been made *in invitum*, and even then, after trial, the right to a prohibition would be gone; but here the Judge having jurisdiction over the cause, and having power to make an order sending the interpleader matter to the Judge of the County Court of Hastings, to be dealt with wholly by him, or to retain it in his own Court to be dealt with there, made an order directing the proceedings to be taken in his own Court. Afterwards, because it was more convenient to try the issue in the County of Hastings, he varied his order, on the application and at the request of the defendants and with the consent of the plaintiff, so far as to order the trial of the issue to take place before the Judge of the County Court of Hastings. The parties went down to trial there for their own convenience; it was their own act; the order allowing it may have been erroneous, but having been made at the special request of one party and with the consent of the other, and so drawn up, it could not have been appealed against. If either party repented of his having procured the Judge to make the order, he should have appealed to the Judge himself to revoke it before having been acted upon; but the party applying for the order cannot now, after the issue has been decided against him, and the whole matter has been disposed of upon the basis of the verdict, move for a prohibition to prevent his own act having its legitimate consequence attendant upon it, any more than he could have appealed against an

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order made at his own special request. There is no such absolute right to a prohibition as would enable a party thereto to trifle with the Court after he found the tribunal of his own election deciding against him.

Summons discharged.

PETTIT V. MILLS.

Civil right to recover expenses incurred in criminal prosecution—Pleading.

Plaintiff sued defendant for money of which he had robbed him, and for the money he had spent in a criminal prosecution for the crime, and for damages for the trespass. The second count of the declaration was for trespass. The third count set out the robbery, the conviction, and that plaintiff had been put to expense in bringing defendant to justice, whereby the latter became liable to the former for the sums so expended.

Held, that though the third count might be good in trespass it was not so in assumpsit, and that either the second or third count must be struck out.

Quare, whether the plaintiff could recover his expenses and outlay in this action.

[February 10, 1876—*Mr. Dalton.*]

The defendant was found guilty of robbery of a large sum of money from the plaintiff's house. The plaintiff thereupon brought this action to recover the money so taken, as well as the expenses attending the criminal prosecution, and damages for the trespass. The second count of the declaration was for trespass, and the third set out the facts of the robbery, adding that the defendant had been arrested on the information of the plaintiff, and afterwards tried and convicted, and that the plaintiff had expended large sums of money in so bringing the defendant to justice, whereby the latter became liable to the former in the sums so expended.

A summons was obtained to strike out either the second or third count, or for leave to plead and demur to the third count, on the ground that both counts were in trespass, that the third was a count in tort as well as assumpsit, and that expenses incurred under such circumstances were not recoverable.

Muir shewed cause, and contended that as the civil right was suspended until the criminal was brought to justice, the plaintiff necessarily had to expend the moneys he now sought to recover before he could bring the present action,

and it would be for a jury to determine the amount: *Reid v. Kennedy*, 21 Grant, 86; *Chowne v. Baylis*, 31 Bea., 351.

Davidson, contra.

MR. DALTON.—The count may be a good count in trespass, but not in assumpsit, and either the second or third count must be struck out. I do not think that the plaintiff can recover his expenses and outlay in this action.

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Relicta verificatione—Signing judgment on—Reg. Gen. T. T. 1856, 8, 26.

A judgment may be regularly signed on a *relictæ verificatione* without a Judge's order, and without the signature to the relinquishment being verified by affidavit.

It is proper on entering judgment in such a case to set out the plea, joinder of issue, and *relictæ* upon the roll.

[February 17, 1876—*Mr. Dalton.*]

There were two defendants in this case, Fraser and Aylwin. The defendants appeared by different attorneys, and pleaded separately. The plaintiff joined issue on the plea of each defendant.

Subsequently the attorney for defendant Aylwin signed a *relictæ verificatione* in the following form :—

“ The seventeenth day of December, in the year of our Lord, 1875. And the defendant, Horace Alywin, as to the plaintiff's replication to his pleas, says that he relinquishes his said pleas, and abandons all verification thereof.”

The attorney for defendant, Fraser, signed a relinquishment according to the same form.

These relinquishments were signed by the respective attorneys, and given at the request of the plaintiff's attorney, and filed by him. There was no affidavit filed verifying the signatures of the defendants' attorneys. On the relinquishment being filed, plaintiff's attorney signed final judgment. The roll set out the declaration, pleas, joinders of issue, and relinquishments, and then continued: “ And thereupon the defendants, with the consent of the plaintiff, relinquishing their said pleas by them pleaded to the said declaration, say that they cannot

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deny the action of the plaintiff, nor but that the plaintiff ought to recover against the defendants his said debt by reason of the premises, whereby the defendants remain undefended against the plaintiff. Therefore," &c.

Osler, for defendant Aylwin, obtained a summons calling on plaintiff to show cause why the judgment should not be set aside on the grounds (amongst others) that it was irregularly signed in this: 1. That no Judge's order for the withdrawal of the defendant's plea was made or filed on signing judgment. 2. That if the alleged consent were sufficient, the Deputy Clerk of the Crown should not have signed said judgment without an affidavit of the due execution thereof. 3. Because said judgment was signed while the defendant's pleas were still on the file.

Brough, for plaintiff, shewed cause.

1. The relinquishment is an entry in the nature of a rejoinder—its use has long been recognized—and an order for withdrawal of pleas was necessary; Rastell's entries, tit. *Appel de Mort*. p. 49, pl. 6, sp. 52, pl. 15; *McIntyre v. Miller*, 13 M. & W. 725; *Cooper v. Painter*, 13 M. & W. 734 (a); *Hutton v. Turk*, 13 M. & W. 734 (a); *Davidson v. Bohn*, 5 C. B. 170; Bullen & Leake P., 3rd ed., 672 and 657.

This proceeding is recognized by Reg. Gen. T. T. 1856, No. 8, and here the relinquishment was entered at the instance of the plaintiff's attorney. A relinquishment, being in the nature of a pleading, does not come within the meaning of rule 26, Reg. Gen. T. T. 1856, relating to cognovits. This is shewn by the fact that the proceeding by relinquishment is recognized by rule 8 of the same general rules. And in England, where 1 & 2 Vict. cap. 110, prescribed similar formalities in the execution of cognovits to this prescribed in this province by rule 26, Reg. Gen. T. T. 1856, the proceedings by relinquishment subsequently to the statute, has been held regular: *McIntyre v. Miller*, sup.; *Davidson v. Bohn*, sup.

2. As the entry was a pleading, it was unnecessary that the signature of the defendant's attorney should be verified by affidavit.

3. The plaintiff was entitled to allow the pleas to remain on the file, and to set them out in the roll, together with the joinder of issue and relinquishment: Chitty's Forms, Bk. vi., c. 4, form 30. The proceedings here are similar to those in case of failure by defendant to rejoin,

where, although it was formerly considered that the plaintiff should cause the replication and plea to be struck out, and then enter judgment for default of plea, it has since been settled that he may, at his option, either adopt that course or set out the plea and replication on the roll, together with a suggestion of the default in rejoining, and enter judgment for default of rejoinder: *Lawes v. Shaw*, 5 Q. B. 322. But even if the pleas should have been struck off the files, it was the duty of the clerk so to have done, and no order was necessary for the purpose: *Anon. Lord Raym.* 345; *Tidd's N. Pr.*, 413; Chitty's *Archbold's Q. B. Pr.* 12th ed., 947. And the irregularity (if any) having arisen through an omission of its officer, the Court will not allow the plaintiff to be prejudiced thereby: *Nazer v. Wade*, 1 B. & S. 723; *Evans v. Jones*, 2 B. & S. 45.

Osler, in reply, cited Reg. Gen. T. T. 1856, S. 26, and submitted that the present cause came within the rule.

MR. DALTON.—I consider the judgments regular. The plaintiff was entitled to enter judgment on the relinquishment given. I might have had more difficulty in determining as to the validity of a relinquishment where there had been a demurrer to the plea, owing to the rule that a party cannot confess the law against himself; but even that question appears to be settled by the cases in *Meeson & Welsby*. I consider also that the plaintiff was entitled to set out the pleas, joinder of issue and relinquishment upon roll, if he so desired, and that he acted properly in so doing. I therefore discharge the summons with costs.

Summons discharged.

CITY BANK V. MCKAY.

Service on principals—Notice to plead.

It is not irregular, under C. L. P. Act, sec. 61, to serve, in Toronto, a country attorney; and ten days' notice is not necessary under such circumstances.

February 19, 1876—*Mr. Dalton.*

The defendant's attorney, who resided in Dundas, had been served with the declaration when he happened to be in Toronto. A summons was obtained to set aside the service, on

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the ground that the attorney's agent, and not the attorney himself, should have been served under C. L. P. Act, sec. 61, and that, supposing the service good in this particular, ten days' notice to plead should have been given instead of eight, under 34 Vict. cap. 12, sec. 12.

Monkman shewed cause. The C. L. P. Act, sec. 84, provides that declarations and other pleadings may be served in any county. The service was therefore as good on the principal in York as it would have been in his own county of Wentworth. As to the notice to plead, ten days is only required when the agent is served.

Davidson, contra.

Mr. DALTON thought that the service was good under section of the C. L. P. Act cited in its support, and that the eight days' notice was sufficient. The summons was accordingly discharged with costs.

Summons discharged.

SLATER v. STODDARD.

Change of attorney—Costs.

The plaintiff had paid costs of a suit to A., of the firm of A. & B., his attorneys. A. & B. dissolved, B. retaining the suit. Application to change attorney to A. granted, without any condition as to payment of costs.

[February 29, 1876—*Mr. Dalton.*]

Summons to change the plaintiff's attorney. It was asked that the order should be made subject to the usual condition of payment of the attorney's costs. It appeared, however, that the attorney sought to be substituted was a partner of the original attorney at the time the suit began, and that the former had already received from the plaintiff the costs due by him.

MR. DALTON held that the plaintiff was not liable to the attorney whose name appeared in the writ for the costs which had been paid to his partner, and that the summons must be made absolute without any condition as to payment of these costs, either by the plaintiff or the attorney who received them.

Order accordingly.

HUSTON v. WALLACE.

Proceeding within a year.

Held, that the obtaining of a Judge's order by the defendant to set aside an irregular notice of trial, is not a proceeding within a year, which will entitle the plaintiff to proceed without giving a term's notice.

[March 9, 1876—*Mr. Dalton.*]

A summons was obtained to set aside a notice of trial, on the ground that no proceeding had been taken within a year, and that a month's notice had not been given of intention to proceed. Notice of trial had been served for last assizes, but an order was made to set it aside, as being served too late.

Small shewed cause, citing 2 Tidd's Prac. 8 ed., p. 816.

Mr. Johnson (T. H. Bull) contra.

Mr. DALTON.—The only proceeding taken was to obtain an order to set aside the plaintiff's irregular proceeding. This should not entitle the plaintiff to claim that a proceeding in the cause has been taken within a year, so as to take the case out of the general rule. The summons must be made absolute.

Order accordingly.

WATSON v. HENDERSON ET AL.

Interpleader—Parties acting under judicial authority—Liability of auctioneers.

An interpleader order was granted in this case in favour of an auctioneer, who had sold goods for the mortgagee of the owner, but had, in obedience to a Judge's order, paid over the proceeds to an assignee of the owner, subsequently appointed in insolvency proceedings.

[March 16, 1876—*Mr. Dalton.*]

A summons was taken out by the defendants requiring the plaintiff and the assignee of the estate of one Harvey, to interplead respecting the right to the proceeds of the sale of the goods sued for. The facts were as follows:—The plaintiff, about the 17th of August, 1875, requested the defendants, who were auctioneers, to remove the goods in question, which he claimed under a chattel mortgage, from the premises occupied by Harvey to their sale rooms for the purpose of sale. The defendants removed the goods, and were proceeding to sell them, when

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the sheriff of York seized them under a writ of attachment against Harvey. The defendants proceeded to sell with the approval of the sheriff, and received the greater portion of the proceeds. On the 21st August, Mr. Boustead was appointed assignee of Harvey's estate. He claimed the proceeds of the sale from the defendants, and shortly afterwards obtained an order from the junior Judge of the county of York directing the defendants to pay the proceeds to him as assignee. The defendants paid the money over to Boustead forthwith. The plaintiff then brought this action to recover the price of the goods.

Ferguson, Q. C., for the plaintiff, shewed cause. The plaintiff had taken possession by his agents, and the sheriff had no right to seize. The agents sold the goods, and paid the money over to a third party, and their right to interplead is gone. The defendants filed a bill for interpleader in Chancery, setting up the same facts as they allege here. The plaintiff demurred to the bill, and judgment was given in his favour. The defendants now also pleaded a plea on equitable grounds in the present action, to which the plaintiff demurred, and judgment was given in his favour on the demurrer. This was over a month ago, and the defendants should have made their present application earlier. See *Henderson v. Watson*, 23 Gr. 355.

Monkman, for the defendants, contra. The assignee claims the goods on the ground that the mortgage was void, and if so the sheriff had a right to seize. The case in Chancery was not decided on the merits. *Blake*, V. C., in *Henderson v. Watson*, felt bound to follow the judgment of *Proudfoot*, V. C., in the case of *McKinnon v. Boulton* (not reported), who decided that when an action had been commenced at law complete justice might be done between the parties under the Administration of Justice Act, section 8. *Wilson*, J., in his judgment on demurrer, does not mention the order made by the County Court Judge at all, and seems to have decided the case without reference to it. The cases of *Lloyd v. Harrison*, 6 B. & S. 36, and *Thomas v. Hudson*, 14 M. & W. 353, and 16 M. & W. 885, in Error, shew that though the Judge may be wrong in making an order on a particular state of facts, still if the order is made with reference to a matter over which he has jurisdiction, parties acting in obedience to it are protected. The defendants are only precluded from interpleading where they have paid over the money voluntarily. Here they have paid it in obedience to judicial authority, and without col-

lusion, therefore they are entitled to interplead: *Davidson v. Douglas*, 12 Gr. 181.

Lash, for the assignee, was willing to pay the money into Court, to await the result of an interpleader issue.

MR. DALTON thought that the case was one in which the relief sought for should be granted. The case of *Davidson v. Douglas* seemed very strongly to favour the defendants' contention, and was an authority which might properly be followed in the present instance.

Order accordingly.

GORDON ET AL. V. GREAT WESTERN RAILWAY COMPANY.

Court of Appeal—Application for further time to appeal.

Application to extend the time for giving notice of intention to appeal to the Court of Appeal, on the ground that the attorney for the party desiring to appeal had omitted to give the required notice within the prescribed fourteen days. There had been a delay of a month in making the application.

Held, that the mere statement of an unexplained "oversight" on the part of the attorney was an insufficient reason for granting the leave, though it might be otherwise if there were an important question of law involved, as to which there was a conflict between the Courts.

[March 20, 1876.—*Harrison, C.J.*]

J. B. Read obtained a summons calling on the plaintiffs to shew cause why the time for appealing from the judgment of the Court, ordering a verdict to be entered for the plaintiffs, should not be extended for a week, or why the defendants should not now be allowed to give notice of their intention to appeal, notwithstanding that the time within which they ought to have given such notice had expired.

The affidavits on which the summons was granted were two: one of the defendants' solicitor, and one of another solicitor instructed by the defendants' solicitor to make the application.

The former solicitor swore that judgment was pronounced on the 8th January last, setting aside the nonsuit in this case and directing a verdict to be entered for the plaintiffs for \$2,564.80: that on the day of swearing to the affidavit (22nd February, 1876,) he received from his Toronto agents notice of taxation of the

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plaintiffs' costs, preparatory to the entering of judgment, and that it was the intention and is the wish of the defendants to appeal to the Court of Appeal, and the omission to give the usual fourteen days' notice "was an oversight," and that the plaintiffs have not been in any manner prejudiced by the delay.

The latter solicitor swore that he was instructed by counsel who appeared for the defendants that the Court held, under the evidence given at the trial, the goods were carried by the defendants under a new contract, and not under the terms and conditions of the contract originally entered into at the shipment of the goods; that he was informed and believed that evidence could be produced to satisfy the Court of Appeal that the defendants carried the goods in connection with the Cincinnati, Hamilton, and Dayton Railroad Company (the company with which the goods were originally shipped), and that they always had, and in this instance did carry the goods under the original contract made with the company with which the goods were originally shipped; that the company held the original shipping bill on the defendants' account, and for that reason the defendants never required a new shipping bill when the goods were handed over to them, which they would otherwise have insisted on; that the amount was large, and that when the plaintiffs brought an action in the Queen's Bench for the same cause of action they were nonsuited, and the nonsuit was sustained by the full Court.

D. B. Read, Q. C., shewed cause. The question in dispute was rather as to a matter of fact than of law. The Queen's Bench drew an inference from the facts unfavourable to the plaintiffs; and the Common Pleas, from the same and additional facts, drew an inference favourable to the plaintiffs. There is no difference as to the law between the two Courts, and therefore nothing to appeal. The affidavits filed shew no sufficient ground for granting the relief asked.

J. B. Read, contra. The case involves an important question of law about which the two Courts are apparently in conflict, and it is therefore important to have the law settled by the Court of Appeal. The defendants disclose sufficient grounds for the relief asked.

HARRISON, C. J.—It is provided by secs. 24 and 25, of Con. Stat. U. C. cap. 13, as amended by 34 Vict. cap. 11, sec. 1, O., that, "in all cases of motion for a new trial upon the ground

that the Judge has not ruled according to law, if the rule to shew cause be refused, or if granted, be afterwards discharged or made absolute, the party decided against may appeal;" and that "no appeal shall be allowed, * * unless notice thereof be given in writing to the opposite party or his attorney, and to the clerk of the crown of the proper Court, within fourteen days after the decision complained of, or within such further time as the Court appealed from, or a Judge may allow."

The latter section is taken from sec. 37 of the Eng. C. L. P. Act, 1854, excepting that in England four and not fourteen days are allowed for giving the notice of appeal. The concluding words of our enactment and of the English enactment are the same.

It was at one time supposed that no extension could be granted unless the application for extension of time were made within the given number of days, (*Wilson v. Lane*, 25 L. J. Ex. 240,) but the contrary was afterwards held in *Ward v. Lumley*, 5 H. & N. 660; 2 L. T. N. S. 469, and the latter case has been approved in this province: *Regina v. Miller*, 23 U. C. Q. B. 203. I apprehend, therefore, there can be no doubt as to the power of the Court or a Judge to grant further time for giving the notice to appeal, notwithstanding the expiry of the fourteen days, but the power should not be exercised, except in a proper case and on proper materials.

The Court or Judge must, in such case, use a discretion and be guided in the exercise of that discretion by the particular circumstances of each case: *Kelher v. Baxter*, L. R. 2 C. P. 174. In *Watson v. Lane*, 25 L. J. Ex. 240, it was intimated that the mere fact of the attorney having inadvertently allowed the time to elapse was no ground for the exercise of the discretion. In *Regina v. Miller*, 23 U. C. Q. B. 203, where defendant was told by the Court, when judgment was given against him, that his remedy, if any, was in Chancery, and he afterwards filed a bill in Chancery and failed, the Court after a delay of nearly three years, refused to grant further time for giving the notice of appeal.

The delay in the application here is about a month after the expiration of the fourteen days allowed by the statute for that purpose. The ground alleged is that there was an "oversight." But it is not stated whose oversight it was; nor is the oversight in any manner explained or excused. Assuming that the oversight was that of the solicitor for the defendants, *Watson v. Lane*, 25 L. J. Ex. 240, is an authority to

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shew that the ground alleged is not sufficient for the granting of the application. However, the case were one involving a difficult question of law, and one about which the two superior Courts of law were at variance, I should feel inclined to grant the relief asked, although the affidavits are anything but satisfactory. But having read the judgment of Chief Justice Richards, in *Gordon et al. v. Great Western Railway Co.*, 34 U. C. Q. B. 224, and the judgments of Chief Justice Hagarty and Mr. Justice Gwynne, in the case between the same parties, in the Common Pleas (25 C. P. 488). I am unable to say that the present is such a case as last supposed.

The question whether carriers undertake to carry beyond their line is generally one rather of fact than of law. This is certainly the case when there is no writing to be construed. And even when there is a writing to be construed, it is so to a great extent, for the writing ought not in all cases to be read to the exclusion of all other facts in the case: See *Muschamp v. L. & P. R. Co.*, 8 M. & W. 421; *Watson v. A. R. & B. R. Co.*, 15 Jur. 448; *Fowler v. G. W. R. Co.*, 7 Ex. 699; *Scholhorn v. S. S. R. Co.*, 8 Ex. 341; *Collins v. Bristol & Exeter R. Co.*, 11 Ex. 790; 1 H. & N. 517; 7 H. L. C. 194; *Wilby v. W. C. R. Co.*, 2 H. & N. 703; *Mytton v. Midland R. Co.*, 4 H. & N. 615; *Coxon v. G. W. R. Co.*, 5 H. & N. 274; *Great Western R. W. Co. v. Blake*, 7 H. & N. 987; *Wellber v. G. W. R. Co.*, 3 H. & C. 771; *Keys v. Railways*, 8 Ir. Com. L. R. 167; *Hayes v. S. W. R. Co.*, 9 Ir. Com. L. R. 474.

In *Gordon et al. v. G. W. R. Co.*, 34 U. C. Q. B. 234, Chief Justice Richards, dealing with the case on the evidence then before the Court, said: "The inference I draw from the bill of lading is, that the Cincinnati company are the parties who contract with plaintiff for a through freight to Thorold, via Detroit and the G. W. R. Co., and they undertake to deliver to the connecting lines, &c. * * * If it is seriously contended that this is not a contract for the carriage through from Cincinnati to Thorold at one freight, then it would be desirable that there should be a new trial that that fact may be shewn."

The plaintiffs submitted to the nonsuit and instituted a new suit in the Court of Common Pleas, in order to supply the omitted facts. And this they appear to have done most effectually. They proved that the freight paid to the Cincinnati Railway Company was for carriage only to

Detroit, and that the plaintiffs had a contract with the defendants for the carriage of cotton from Detroit to Thorold. The latter contract was not shewn to be subject to the conditions exempting the railway company from losses arising by fire. The cotton was destroyed by fire while in transit from Detroit to Thorold. The Court, therefore, found that there were two contracts—one for carriage from Cincinnati to Detroit, and the other from Detroit to Thorold; that the first was made with the foreign railway company, and the second with the defendants; that the first exempted the company from losses by fire, but that the latter contained no such exemption. And so, pursuant to leave reserved, the Court directed the verdict to be entered for the plaintiffs.

The finding is a finding as to a matter of fact. It is the only finding which the facts warrant. The two Courts are not at all at variance as to the law. Indeed there is no dispute as to the law. The difficulty in every such case is, as to the facts. When the facts are found the application of the law is easy. In the two cases the facts proved differed. There was, therefore, a difference as to the results; but in neither case does there appear to be any difficulty as to the law.

I do not see anything to be carried to the Court of Appeal, and must discharge this summons with costs.

*Summons discharged.**

* This case was followed by *Galt, J.*, in a case of *Gilmour v. Strickland* (29th May, 1876). In that case it appeared that the notice had not been served owing to an oversight of the attorney simply, and it was not shewn that the case was not a proper one for appeal.—REP.

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Municipal election—Want of qualification—Acquiescence of relator.

An elector who, at a nomination meeting, acquiesces in a statement of fact by the returning officer, which, if true, would entitle the defendants to sit, and himself becomes a candidate on the strength of that statement, will not, when defeated at the polls, be heard, as a relator, to object that in fact the statement was incorrect, and that the defendants were therefore disentitled.

[March 29, 1876.—*Harrison, C. J.*]

The statement alleged that the defendants occupied the office of councillors in the incorporated village of Newbury, under the pretence of an election held on the 3rd of January, 1876, at the village of Newbury, and that the relator had an interest in the election as an elector of the village who gave his vote at the election.

The grounds alleged were in effect, that the defendants had not, nor had any or either of them, at the time of the election, in their own right or in the right of their wives, as proprietors or tenants a legal or equitable freehold or leasehold, or partly legal or partly equitable, rated in their own names respectively, on the last revised assessment roll of the village to the value of \$600 freehold or \$1200 leasehold, and that there were at the time of the election at least two other persons qualified to be elected for each seat in the council of the incorporated village.

The contention on the part of the defendants was, that there were not before and at the time of the election at least two persons qualified to be elected for each seat in the council, and so that under sec. 74 of the Municipal Institutions Act no qualification beyond the qualification of an elector was necessary.

The nomination was on the 27th December, 1875, and the poll was held on the 3rd of January, 1876, the result of the polling being, that the respondents were declared elected as councillors.

The relator swore that before and at the time of the election there were at least two persons qualified to be elected for each seat in the council to the amount required by law, (naming those that were qualified), and that none of the said persons were in any way disqualified or exempt from serving. He also swore that at the time of the nomination it was objected (not saying by whom) that the respondents were not qualified to be elected as councillors, they not having the necessary property qualification—though they

seem to have been sufficiently qualified as electors.

In answer the affidavit of Thomas Robinson, the Reeve, was filed. He swore that on the nomination day before any nomination took place the clerk announced that there were not two persons in the municipality qualified to be elected for each seat in the council and that therefore the only qualification necessary was that of an elector, that fourteen persons were thereupon nominated for the office of councillor at the election, and amongst others the defendants and relator, and all of them went to the polls, that no objection was made to the nomination of any of the persons on account of the want of property qualification, and the relator himself was one of those having only the qualification of an elector, that there were not, as he believed owing to certain circumstances which he detailed, at the time of the election ten persons qualified to be elected to seats in the council.

G. D. Boulton, for the respondents, objected that the relator being an assenting party to the election and himself a candidate thereat ought not after he had been defeated to contest the election on a ground that was not raised at the nomination: *Reg. ex rel. Rosebush v. Parker*, 2 C. P. 15; Cole on Informations 174, 5; *Reg. ex rel. Mitchell v. Adams*, 1 Cham. R. 203, and argued that it did not appear that at the time of the election there were ten qualified persons in the village.

Osler, contra. The relator not having voted for defendants was qualified to be relator and it sufficiently appears that there were ten qualified persons in the village before and at the time of the election.

HARRISON, C. J.—The statement in the affidavit of the relator, that an objection was raised at the nomination to the qualification of the candidates is very loosely made and is positively denied. I think the weight of evidence is entirely in favour of the contention that no such objection was made, and that when the objection, if a good one, ought to have been made all the electors present at the nomination appeared to acquiesce in the statement of the clerk that there were not two persons qualified for each office, and therefore that the qualification of an elector was all that was necessary.

The relator does not say that he or any other person named in any manner contradicted the

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assertion of the clerk, and so far as one can judge by his conduct, he only being qualified as an elector, and yet seeking election as a councilor, concurred in the statement of the clerk.

The question now arises whether *at his instance*, he having been defeated in the contest, the election should be set aside. If I hold in the negative on this point it will be unnecessary to determine the question whether before or at the time of the election there were ten persons qualified in the village.

The summary mode prescribed by the Municipal Institutions Act for the trial of municipal elections is a substitute for the arduous and expensive proceeding by *quo warranto* information : *Regina ex rel. White v. Roach*, 18 U. C. Q. B. 226, and the general practice is to confine parties as much as possible to relief under the statute : *In re Kelly and Macarow*, 14 C. P. 457. But in dealing with cases which arise under the statute, the principles of the old law as to the competency of the relator are still applicable, and, so far as applicable, ought to be followed : *Regina ex rel. Loyall v. Ponton*, 2 Prac. R. 18; *Regina ex rel. Rosebush v. Parker*, 2 C. P. 15; *In re Kelly and Macarow*, 14 C. P. 457; *Regina ex rel. Grayson v. Bell*, 1 C. L. J. N. S. 130.

In Cole on Informations, p. 174, it is said, "A burgess or other person having sufficient interest to be a relator in a *quo warranto* information, may nevertheless have so acted as to render himself disqualified to be such relator, and on that ground the Court will refuse an information *at his instance*, although a valid objection to the defendant's title be shown."

A party ought not to be permitted to play "fast and loose" in these matters just to suit his own particular interest : per Taunton, J., in *The King v. Parkyn*, 1 B. & Ad. 694. The principle is, that a man shall not apply to the Court as relator if he has concurred in the irregularity of which he complains : per Coleridge, J., in *Regina v. Green*, 2 Q. B. 465. It is very much like the case where an arbitrator has done something wrong, but both parties although knowing of it, nevertheless proceed, and neither can afterwards take advantage of the objection : per Blackburn, J., in *Regina v. House*, L. R. 1 Q. B. 440.

A person who, at the time of an election, is aware of some irregularity, but lies by and consents to the election as if regular, will not

afterwards be heard as relator to question its regularity : *King v. Stacey*, 1 T. R. 1.

The Courts have on several occasions said, and said wisely, that they will not listen to a corporator who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose : per Lord Kenyon, in *Rex v. Clarke*, 1 East 46.

In *Rex v. Mortloch*, 8 T. R. 300, the Court refused to grant an information in the nature of a *quo warranto*, because the party applying for it had agreed not to enforce a by-law upon which he afterwards attempted to impeach the defendant's title.

An application for a *quo warranto* information, made on the affidavits of several persons, of whom all but one consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avow himself to be the relator : *Rex v. Symmons*, 4 T. R. 223.

It has been held that it is a valid objection to a relator applying for a *quo warranto* that he was present and concurred in the election of another burger, when the objection he sought by the application to avail himself of was taken and overruled, and he voted for the party then elected : *Rex v. Parkyn*, 1 B. & Ad. 690.

Where a corporator has attended at a meeting for the election of officers of the Borough, he will not be allowed to become relator in *quo warranto*, and impeach the titles of the persons there elected, on account of an objection to the title of the presiding officer, unless he shew that at the time of the election he was ignorant of the objection : *Rex v. Slythe*, 6 B. & C. 240.

A Borough officer who administers a declaration of office to a disqualified councillor, will not be heard as a relator to upset the election : *Rex v. Greene*, 2 Q. B. 460.

Previous to an election, voting papers were delivered duly filled up, except that the column for the number of votes was left blank. After the election, a rule for a *quo warranto* was obtained by one Edward Shaw, one of the unsuccessful candidates, against two of the persons declared duly elected, on the ground that the voting papers having been left blank, the election was void. But the Court held that as Shaw himself had voted with a voting paper left in blank, and had also taken part at former elections where a similar course had been pursued, and had been himself so elected, that he could not be heard as relator : *Regina v. Lofthouse*, L. R. 1 Q. B.

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433. In the last mentioned case, Shee, J., said "The present relator has concurred in the very act he now complains of, for he has used voting papers in blank in this very election and in others. Therefore, in the exercise of our discretion, we ought not to assist him." Page 444.

The principle of the foregoing cases is, that the acquiescence of the relator in the objectionable election, instead of at the time raising the objection, precludes him from afterwards becoming relator.

It might be different if it were shewn that the conduct of the returning officer was plainly illegal; and that the relator was not in any manner instrumental in, or accessory to producing the result of which he afterwards complained: *Regina ex rel. Mitchell v. Adams*, 1 Cham. I^c. 203.

It is doubtful whether at the time of the election, there were in the village two persons qualified for each seat in the council. If the relator at the time knew or had good reason to believe that there were a sufficient number of qualified persons in the village to be elected, it was his duty to have raised the objection instead of acquiescing in the assertion of the township clerk, that there were not. But instead of doing so, he submits to the assertion of the township clerk, who of all men in the township, was best qualified to give an opinion in such a matter, and endeavours to gain an advantage by it by having himself elected to the council, although not qualified, if his present contention is well grounded.

When defeated in this attempt, he suddenly becomes concerned for the public interests, proclaims the clerk was wrong, that all the electors were wrong, that all the elected were wrong, and that he himself was wrong, for there were, in truth, ten qualified persons.

His zeal for the public, if not simulated, comes too late. He does not pretend that he was ignorant of the facts which he now sets up, at the time of the election; on the contrary, he desires the Court to understand that he, or somebody else not named, made the objection at the time of the nomination; other electors with more appearance of truth, say that there was no such objection made.

I do not now decide whether the objection was good or bad, and I do not think I am called upon to decide at the instance of the relator, who, as it appears to me, to serve his own purpose and his own interests, rather than the in-

terests of the electors generally, is endeavouring to play "fast and loose."

His conduct is not to be encouraged, and in order to discourage him and others like him, I dismiss his summons with costs.

Summons discharged with costs.

IN RE LADOUCEUR V. SALTER.

Division Courts—Service of summons out of jurisdiction—Residence—Con. Stat. U. C., cap. 10, sections 70, 79.

Held, that there is nothing in the Division Courts Act to prevent a bailiff serving a summons out of the jurisdiction, though he is not obliged to do so. It is immaterial that a defendant is without the jurisdiction at the time he is served, if at such time he is in law a resident within the jurisdiction.

The defendant worked at Aylmer, in the Province of Quebec, whilst his wife and family lived at Rochesterville, across the Ottawa, in the Province of Ontario, where his wife kept a store, and where defendant often came to see her.

Held, that his residence was with his family, and he was subject to be sued in the proper Division Court in the Province of Ontario.

[March 21, 1876—Harrison, C. J.]

Mr. Justice Gwynne, sitting in Chambers, on 22nd February, 1876, granted a summons upon the application of Thomas Salter, calling on the Judge of the Seventh Division Court of the County of Carleton, and Edward Ladouceur, to shew cause why a writ of prohibition should not be issued, directed to the Judge, and commanding him to stay all proceedings in the plaint brought by Ladouceur against Salter on the ground that the summons was served on Salter without the Province of Ontario, and on grounds disclosed in affidavits and papers filed, and why Ladouceur should not pay the costs of the application.

An affidavit of the defendant, Thomas Salter, was filed in support of the application. In it he swore that he was engaged to work at the village of Aylmer, in the County of Ottawa, and Province of Quebec, by Richard Bluet, blacksmith, of that village: that he had been working for him daily (except Sundays and holidays) since the month of March, 1875, and since that date had earned no wages in the Province of Ontario: that the residence of his wife, Catharine Salter, was at Rochesterville, in the township of Nepean, in

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the Province of Ontario, where she kept a store on her own account : that deponent generally went to see her at the said residence on Sundays, but had no interest in the store except a desire for his wife's prosperity : that on Monday, 31st January, 1876, he was served with a writ of summons issued out of the Seventh Division Court of the county of Carleton, at the village of Aylmer : that the service was under circumstances, unnecessary to be mentioned in the statement of the case ; and that at the time of service the plaintiff was present.

There was no affidavit of his wife filed.

The summons was for the recovery of an account, amounting in the aggregate to \$43.65 ; subject to credits for groceries to the amount of \$21.70 ; and claimed a balance of \$21.95.

J. B. Read shewed cause. He filed an affidavit of the plaintiff, in which he swore that the goods for the sale of which the action was brought, were sold and delivered at the village of Rochesterville, within the jurisdiction of the Seventh Division Court of the county of Carleton : that, at the time when the goods were sold, Salter and his wife and family resided, and have ever since resided, and still reside, at the village of Rochesterville : that during the present winter of 1875 and 1876, and prior to the time of issuing the summons, the defendant occasionally worked at the village of Alymer, but did not do so continuously, and often came to his residence at Rochesterville, where he would remain for periods of one week at a time, but after the issuing of the summons he came to his residence only on Sundays : that about three days after the issuing of the summons, deponent told defendant in his shop, at the village of Rochesterville, that by reason of his neglect to satisfy the claim the summons had been issued against him : that deponent told his wife of the summons, when she said, "Thomas is as cute as a good many in Rochesterville, and will escape a good many terms of that summons. You won't get your money any sooner" : that afterwards Salter remained continually in Aylmer, except on Sundays, when he would come home ; and several unsuccessful attempts were made to serve him in Rochesterville : that Salter applied to the County Judge of Carleton to set aside the service of the summons, but the Judge on hearing the parties dismissed the application.

An affidavit of Celina Ladouceur, wife of Gideon Ladouceur, of Rochesterville, was also filed. In several particulars it corroborated the

affidavit of the plaintiff. No affidavits were filed in reply.

Mr. Read asked, on filing the affidavits, to have the summons discharged with costs. He referred to *Metcalf v. Davis*, 6 Prac. R. 275.

Cassels, contra, cited Con. Stat. U. C. cap. 19, secs. 71, 77, 79; *Deadman v. Agricultural and Arts Association*, 6 Prac. R. 176; *In re Damage and Judge of Leeds and Grenville*, 12 U. C. Q. B. 32; and see subject discussed in 6 U. C. L. J. 112.

HARRISON, C. J.—Section 79 of the Division Courts Act enacts that the bailiffs shall serve and execute all summonses, orders, warrants, precepts, and writs delivered to them by the clerk for service, whether bailiffs of the Court out of which the same issued or not, and shall as soon as served, return the same to the clerk of the Court of which they are respectively bailiffs, but they shall not be required to travel beyond the limits of their division, or be allowed to charge mileage for any distance travelled beyond the limits of the county in which the Court of which they are respectively bailiffs, is situated.

There is nothing in the Act to prevent a bailiff, for the purpose of service, travelling beyond the limits of the county, or the limits of the province. He is not obliged to do so. And if he do so, he is not, as between party and party, to charge mileage for any distance travelled beyond the limits of the county.

The real question for decision in this case is, not where the defendant was served, but was he at the time of service subject to be sued in the seventh Division Court of the county of Carleton. The decision of this question must depend on the construction to be placed on sec. 71 of the Act, which enacts that any suit may be entered and tried in the Court holden for the division in which the cause of action arose, or in which the defendant, or any one of the defendants resides, or carries on business at the time the action is brought, notwithstanding that the defendant or defendants may at such time reside in a county or division, or counties or divisions different from the one in which the cause of action arose. The enquiry is, rather as to a matter of fact than a matter of law : see *per Blackburn, J.*, in *Wescomb's case*, L. R. 4 Q. B. 110, 113.

There is no strict or definite rule for ascertaining in every case what is residence. The word "residence," may have a very different meaning in different statutes : *per Erle, J.*, in

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DALZIEL V. GRAND TRUNK R. W. CO.

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Whithorn v. Thomas, 7 M. & G. 5; and *per* Robinson, C. J., in *Mellish v. Van Norman*, 13 U. C. Q. B. 451, 455.

In general it may be said that a man's residence is where his home is situate—where his family live: *Rex v. Inhabitants of North Curry*, 4 B. & C. 959. An occasional absence from home on business does not make his home less his residence: *Whithorn v. Thomas*, 7 M. & G. 1; *Reg. ex rel. Taylor v. Caesar*, 11 U. C. Q. B. 461. Where a person goes away from a parish for a temporary purpose, leaving a house or lodging behind, he is still in effect residing in the parish: *per Blackburn, J.*, in *Regina v. Glossop*, L. R. 1 Q. B. 229. See further *Rex v. Mitchell*, 10 East. 511; *Re Guilford Union v. St. Olaves' Union*, 25 L. T. N. S. 803; *Regina v. Stourbridge*, 34 L. J. M. C. 179; *Ford v. Pye*, L. R. 9 C. P. 269; *Ford v. Hart*, Ib. 273. Reference may also be made to the following cases: *Marsh v. Hutchinson*, 2 B. & P. 226, note; *Rex v. Sargent*, 5 T. R. 466; *Rex v. Duke of Richmond*, 6 T. R. 560; *Regina v. Boycott*, 14 L. T. N. S. 599; *Taylor v. The Overseers of the Parish of St. Mary, Abbott*, L. R. 6 C. P. 309; *Bond v. The Overseers of the Parish of St. George, Hanover Square*, Ib. 312; *Fry's Election Case*, 10 Am. 698.

Although the village of Rochesterville is in the Province of Ontario, and the town of Aylmer in the Province of Quebec, the distance between the two places is not great. Rochesterville is on the Ontario side of the Ottawa River and Aylmer not far from the other side of the river on the Quebec side. The distance between the two is no more than a moderate walk. A man might well, therefore, reside in Rochesterville and attend to business in Aylmer. There would be nothing to prevent him, if so disposed, returning to his wife and family in Rochesterville daily. The fact that he only visits his wife and family once a week—that is to say, on Sundays—does not, in my opinion, render him less a resident of Rochesterville.

The conclusion which I draw from the facts stated in the affidavits is, that while the defendant was at the time of the issue and service of the writ employed in Aylmer, he had his residence—in other words—resided in Rochesterville—where his wife and family resided. His contention to the contrary does not alter the facts or the conclusions to be drawn from them: *Manning v. Manning*, L. R. 2 P. & D. 223.

The enquiry being as to a matter of fact, and the learned Judge of the County Court having

apparently found against defendant on the facts, I might well have left him there and refused the prohibition on that ground alone; but as the question is one of some general importance in the administration of law in the Division Courts of the Province, I thought it better to take some trouble about it, and, if possible, dispose of it on the merits.

I agree with the learned Judge of the County Court in the result at which he arrived, and discharge the summons with costs.

Summons discharged with costs.

DALZIEL V. GRAND TRUNK RAILWAY CO.

Railway company—Examination of "officer."

The tie inspector of a railway company is not an "officer" of the company within sec. 24 of the Administration of Justice Act.

[March 25, 1876—*Mr. Dalton—Harrison, C. J.*]

An *ex parte* order was obtained by the plaintiff to examine the tie inspector of the western division of the defendants' railway. A summons was thereupon taken out by the defendants to rescind the order on the ground that the tie inspector was not an officer of the railway company, within the meaning of section 24 of the Administration of Justice Act.

G. B. Gordon shewed cause. The officer sought to be examined is one of high authority, having complete control over a very important department of the company's business. Section 24 of the Act should be held to warrant the examination of any officers who had power to make contracts that would bind the company. In *Oakley v. Toronto Grey & Bruce R. W. Co.*, 6 Prac. R. 253, it was held that the chief engineer of the defendants might be examined under this section.

Mr. Teetzel (Bethune, Osler & Moss) contra. The word "officer" in the section should be construed so as to include only such officers as are elected by the shareholders of the company, or at all events, such as are at the head of their respective departments, and make their reports immediately to the directors. The next immediate superior of the tie inspector is the assistant engineer, who is under the orders of the chief engi-

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neer, so that the case cited was no authority in the present instance.

MR. DALTON.—The tie inspector is not immediately responsible to the directors, and is not, I think, an “officer” within the meaning of the Act. The present summons must, therefore, be made absolute. But perhaps as the point was important, it should be heard before a Judge by way of appeal.

The case was therefore brought before the Chief Justice of Ontario, who expressed an opinion in favour of the view taken by Mr. Dalton. But he gave no formal judgment, as the parties subsequently agreed to accept Mr. Dalton’s judgment without further argument.

Order accordingly.

REG. EX REL. HARRIS V. BRADBURN ET AL.

Municipal election—Leaving names of candidates off ballot papers—Acquiescence.

Held, 1. That the name of a candidate who has been nominated, but who withdraws (with the consent of the electors) before the close of the nomination, need not be placed upon the ballot paper.

2. The omission of the name of a candidate from the ballot paper is not *per se* a ground for setting aside an election, if it is not shown that it has in some manner affected the result of the election.

The case of *Reg. ex rel. Regis v. Cusac, ante*, followed, as to the result of acquiescence by a relator in irregular proceedings.

[March 28, 1876.—*Harrison, C. J.*]

The statement complained that the defendants usurped the office of councillors in the township of Dereham, under pretence of an election, held on Monday, 3rd January, 1876, and declared that the relator had an interest in the election as a candidate.

The grounds alleged were, that at the nomination of candidates, held on the 27th December, 1875, Robert Fewster, Daniel Pratt, and Charles Wilson, and the respondents, James Bradburn, Enoch B. Brown, William Vance Ravell, together with Walter Campbell and the relator, were all duly nominated as fit and proper persons to be elected councillors; yet the returning officer at the election entirely omitted to place upon the ballot papers prepared for the use of the electors, the names of Fewster, Pratt, and Wilson.

There were only two affidavits filed in the first instance in support of the relation—an affidavit of the relator, that the grounds mentioned in the statement were well founded, and his belief that the grounds stated were true in every particular; and an affidavit of James Dumbley, to the effect that he was present at the nomination, and that all the persons whose names are given as candidate in the statement, were all nominated and seconded; and that the names of Charles Wilson, Robert Fewster, and Daniel Pratt, were omitted from the ballot papers furnished to the electors.

Neither of the affidavits alleged that if the names of the persons whose names had been omitted had been placed on the ballot papers, the result of the election would have been different.

Wells shewed cause, filing several affidavits in answer. The persons who were said to be candidates were not candidates. There was no such irregularity as would avoid the election, and even if there were, the election ought not to be avoided at the instance of the relator, who acquiesced in all that was done, and now only objects because he, though a candidate, was defeated at the poll: *Morris v. Burdett*, 2 M. & S. 216; *Muntz v. Sturge*, 8 M. & W. 310; *Charles v. Lewis*, 2 Cham. R. 171; *Regina ex rel. Ritson v. Perry*, 1 Prac. R. 237; *Regina ex rel. Coyne v. Chisholm*, 5 Prac. R. 328; *Regina ex rel. Walker v. Mitchell*, 4 Prac. R. 218; 33 Vict. cap. 28, sec. 38. The returning officer, whose affidavit was also filed, swore that the mover and seconder of Pratt withdrew his nomination, and that no objection was made by the electors present at the nomination. He also swore that Robert Fewster was not present at the meeting, but his mover and seconder withdrew his nomination with the assent of the electors. He further swore that Charles Wilson was not present, but that on the day following he (the returning officer) received from Wilson a letter desiring him to remove his name from the list of candidates. He accordingly omitted the names of these three persons from the ballot papers, and swore that in giving out and receiving the ballot papers from any elector who came to vote at the election, no objections were made on the grounds that the names of these persons had been omitted from the ballot papers. He also swore that the relator was present at the nomination and offered no objection to the withdrawal of the names of the three persons in question. The statements contained in the affidavit of the returning officer were corroborated.

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in various particulars by other affidavits. Numerous other affidavits were filed in support of the case of the respondent.

D. B. Read, Q. C., contra. If any one of the gentlemen nominated had not resigned, and his name was omitted from the ballot papers, the election was void. Two at least of them were candidates whose names had been omitted from the ballot papers. The relator had not done anything to acquiesce in the irregularity of the election. He referred to 36 Vict. cap. 48, secs. 104, 108, 109; 38 Vict. cap. 28, secs. 1 and 3. He offered several affidavits in reply, to which objection was made on the ground that they ought to have been filed in the first instance.

HARRISON, C. J.—It appears to me that the weight of evidence is in support of the contention that Fewster and Pratt, although nominated as councillors, were, with the assent of the electors present, withdrawn before the nomination closed, and therefore their names were properly omitted by the returning officer from the ballot papers: *Harris v. Burdett*, 2 M. & S. 212, 216; *Muntz v. Sturge*, 8 M. & W. 302, 310; *Regina ex rel. Coyne v. Chisholm*, 5 Prac. R. 323; *Davies v. Kensington*, L. R. 9 C. P. 720.

Strictly speaking the returning officer, according to what is shewn in his own affidavit, should have inserted the name of Wilson on the ballot papers: 36 Vict. cap. 48, secs. 104, 108; 38 Vict. cap. 28, sec. 3, sub-sec. 2: but as the omission of Wilson's name is not shewn to have in any manner affected the result of the election, it is not *per se* a ground for setting aside the election: *Regina ex rel. Walker v. Mitchell*, 4 Prac. R. 218; *Woodward v. Sarsons*, L. R. 10 C. P. 733; *Regina ex rel. Ritson v. Perry*, 1 Prac. R. 240, 241. And looking at the contradictory affidavits which Mr. Wilson has made on behalf of the defendants and the relator respectively, I apprehend that the electors will not sustain much loss in not having him as one of their councillors for the current year.

Even if the grounds alleged were sustained by the evidence, I should have some hesitation in setting the election aside at the instance of the relator, who, instead of remonstrating against the supposed irregularities, took his chance of things as they were, and having been himself defeated, is now endeavoring to defeat the choice of the electors.

I recently had occasion, at some length, in *Reg. ex rel. Regis v. Cusac*, (ante p. 303,) to state

what I think of such relators, and how little disposed I am to assist them in what appears to be "fast and loose" conduct.

It would be different where the question raised is, which of the candidates really has the majority of votes, and the relator claims a seat either on a scrutiny, or because his opponent is disqualified with notice thereof to the electors before and at the time of the voting. But where an election is attacked merely on the ground of some irregularity or informality, the attack would be much more likely to succeed on the relation of a person, who in no manner acquiesced or appeared to acquiesce in the supposed irregularity or informality.

I must dismiss this relation with costs.

Summons discharged with costs.

IN THE MATTER OF HENRY SANDFIELD MACDONALD AND THE MAIL PRINTING AND PUBLISHING COMPANY.

Joint stock company—Transfer of shares—Mandamus.

This was an application by the transferee of certain shares in a joint stock company, for a mandamus to compel the directors to enter such transfer in the books of the company, so as to perfect the transfer. A by-law of the company provided that "any shareholder may, by leave of the directors but not otherwise, transfer his share or shares, by making an entry of such transfer in a book, &c. The directors declined to grant the required leave, but gave no reasons.

Held, that it was competent for the directors to exercise their discretion, without giving reasons; and having exercised this discretion, without evidence of caprice, the application could not succeed.

[March 30, 1876—*Hegarty, C. J.C. P.*]

Messrs. Morland, Watson & Co., the owners of some paid-up stock in the "Mail Printing and Publishing Company," transferred their shares to one H. S. Macdonald, who thereupon requested the Directors to permit the completion of the transfer by having proper entries made in the books of the Company, pursuant to a by-law which reads as follows:—

"Any shareholder may by leave of the Directors, but not otherwise, transfer his share or shares by making an entry of such transfer in a book to be provided for that purpose, such entry to be signed by him and his transferee and witnessed by the Managing Director."

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IN RE MACDONALD AND THE MAIL PRINTING CO.

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The Manager of the Company in his affidavit stated : that on receipt of the request to complete the transfer of ten paid up shares from Morland, Watson & Co., to Henry Sandfield Macdonald by a minute of assent to said transfer in accordance with the by-law of the Company in that behalf, he at once called together the directors for that purpose, no transfer ever having been made in the Company's books without a resolution first assenting to the same : that on the 27th January last the Directors met, and the application of Mr. Macdonald was brought before them ; four of the five Directors being then present : that after protracted consideration of the subject, and for reasons which seemed to them good and sufficient after weighing all the circumstances, the Board unanimously came to the conclusion that it was not in the interest of the Company that their assent should be given to the proposed transfer : that on the same day the Secretary of the Company notified Mr. Macdonald's solicitor in a letter which reads as follows :—

Gentlemen,

I am directed to hand you copy of resolution passed this day at a meeting of the Directors of the Mail Printing and Publishing Company, in accordance with by-law No. 14 of the Company.

Yours, &c.

Resolved—That this Board does not assent to the proposed transfer of ten shares from Morland, Watson & Co., to H. S. Macdonald.

This affidavit also stated that the Company was formed for political purposes, and that the Directors considered it inimical to these purposes to give the assent asked for, and refused the said application on its merits.

Upon this refusal of the Directors to consent to the transfer a summons was obtained under 35 Vic. cap. 14, from the Chief Justice of Ontario, calling on the Company to shew cause why a writ of mandamus should not be issued commanding the Company to register upon its books the name of H. S. Macdonald as the holder of ten shares of the Capital Stock of the Company, at that time held in the name of Morland, Watson & Co., &c.

C. Robinson, Q. C., shewed cause. The Directors having in good faith, after consideration, and without evidence of malice or caprice exercised the discretion conferred upon them by the by-law of the Company, cannot be compelled to assent to a transfer, and this summons should be

discharged with costs : *In re Gresham Life Ins. Society*, L. R. 8 Chy. Ap. 449.

Osler supported the summons, citing *Smith v. Canada Car Co.*, 6 Prac. R. 107.

HAGARTY, C. J.—I discharge this summons for a mandamus, but without costs, as I think the decision in 6 Prac. R. 107, (*In re Canada Car Company*), raised a doubt as to the law. The case in 8 L. R. Chy. Ap. 449, though previously decided was not cited there. The fact that the refusal to assent without assigning any reason may have induced the application on the principle of this case in our own Court.]

I think costs ought not to be given under the circumstances. The reasons suggested in the affidavits now filed seem ample to justify the first refusal. Had that refusal been placed, e. g., on the mere ground that the directors considered that the applicant's becoming a stockholder would be against the interests of the company, I should consider it quite sufficient. But a simple absolute refusal might mislead parties possibly, and seem like a rough denial of a common right. Granting that it may be made in that short form I hardly think it fair to award costs. No exception could be taken on personal grounds to the statement I have suggested as to its not being considered in the interests of the company to have the applicant as a shareholder, and none of the unpleasant results suggested by the Lord Justices would follow. The unexplained answers might suggest that the objections might be to allowing the assignors to retire from the Company and not as to preventing the applicant to enter it.

Summons discharged.

CHANCERY CHAMBERS.

McAVILLA v. McAVILLA.

Motion to commit for disobedience of order—Con. Gen. Order, 293.

A motion to commit defendant, or to take the bill *pro confesso* for non-attendance of defendant for examination, pursuant to a special order, was refused where the order had not been previously served.

[January 15, 1876—*Referee.*]

By an order of the Court, dated the 29th day of September, 1875, it was ordered that the defendant should personally appear within one month before the Master at Belleville, for the purpose of being cross-examined on his answer in this cause by the plaintiff, at such time and place as the Master should appoint, eight days' notice thereof to be given to the defendant's solicitors; and that the said defendant, upon then and there being paid his proper conduct money, should submit to such cross-examination.

The plaintiff obtained an appointment from the Master on the 18th October, 1875, appointing the 29th October, at 3 p.m., for the examination to take place. This appointment was served on the defendant's solicitor on the 18th October, 1875. The defendant did not attend at the time and place appointed, although he seemed to have known of the appointment, and called at the office of the plaintiff's solicitor shortly before the hour appointed for the examination to take place.

The plaintiff's solicitor then obtained said appointment on the 1st November, appointing the 10th for the examination, which appointment was served on the defendant's solicitor on the 1st November. On the return of this appointment his solicitor appeared, but the defendant himself did not attend. On the 16th November the defendant's solicitor waited upon the plaintiff's solicitors, and informed them that he had received a telegram from the defendant, agreeing to attend and be examined on the 17th November, and requesting that an appointment might be obtained for that day. It so happened, however, that the Master was unable to give any appointment for that day, and therefore the de-

fendant's solicitors concurred in the 22nd November being appointed for the examination.

On the morning of the 17th November the defendant came to Belleville, and offered to submit to examination; but he was told that the examination could not be taken that day, and the plaintiff's solicitor then went with the defendant to the Master's office, when the Master shewed him the appointment made in his book for taking his examination on the 22nd, and the plaintiff's solicitor, moreover, notified him verbally that if he failed to attend he would move to take his answer off the files and to note the bill *pro confesso* against him, or move to commit him for contempt.

Notwithstanding this, defendant did not attend at the appointed time, but went off to the shanties, some fifty miles north of Peterborough, where it would be very difficult to reach him, and from whence he was not likely to return until the spring.

F. Arnoldi, for the plaintiff, now applied to commit the defendant for contempt, in disobeying the order of 28th September, 1875, or to take the answer of the defendant off the files, and to take the bill *pro confesso* against him, or for such other order as the Court might think fit.

W. Cassels, for defendant.

MR. HOLMESTED.—Whatever may have been the intention of the Court or the parties, the order of the 29th of September does not in terms dispense with the service of that order upon the defendant, endorsed with the usual notice required by Order 293. Neither does the Order itself conform to the provisions of that order. And the order, in point of fact, was not served upon the defendant, or even upon his solicitor, at any time before the alleged default was made. This, I think, is fatal to the success of this application. See *Wagner v. Mason*, 6 Prac. R. 187, and the cases of *Rider v. Kidder*, 12 Ves. 202, and *De Manneville v. De Manneville*, ib. 203, Daniell's Pr. 5th ed., p. 903-5, and *Adkins v. Bliss*, 2 De G. & J. 286.

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McAVILLA V. McAVILLA—STREET V. HALLETT.

[Chy. Cham.

It is not possible for me to, nor do I think the defendant's solicitors could dispense with the provisions of Gen. Order 293; and the omission to serve the order, therefore, is a matter which I do not think they could be deemed to have waived. The object of Order 293 is to prevent surprise, and to bring home to the party called on to obey the order of the Court the penalty he will incur by his disobedience; the verbal intimation the defendant received from the plaintiff's solicitor, I do not think can suffice.

The motion to commit, therefore, must be refused, and I think the application to take the bill *pro confesso* must also fail, because it is only in cases where the Court finds that a defendant is in contempt, that that remedy can properly be granted to the plaintiff. Although I am of opinion that defendant has not brought upon himself the penalties of contempt, I nevertheless think he has acted unreasonably, and I refuse to give him any costs of this application.

I think the proper order to make under the circumstances would be, to extend the time for taking the cross-examination, and provide, by the order which I now make, that service of it upon the defendant's solicitor shall be sufficient,

STREET V. HALLETT.

Vendor and purchaser—Incumbrance created pendente lite—Consent decree.

A defendant who claimed to be sole owner of the land in question in the suit, *pendente lite* sold to one H. the right to cut timber on the land. The purchaser at the sale under decree refused to carry out his purchase until the right was released, which H. refused to do.

Held, that the decree having been made by consent, H. was not bound by it; and that, therefore, the existence of H.'s incumbrance was a valid objection to the title, and had not been waived by the purchaser's merely taking a consent to obtain, without having actually obtained a vesting order, nor by his having under the circumstances had the conveyance settled by the Master, without making H. a party to it.

The party having the conduct of the sale represents, for the purposes of the sale so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove, or procure to be removed, any objection which may properly be made to the title.

[January 15, 1876—Referee.]

This was an application by the plaintiff to compel the purchaser, Mr. J. D. Woodruff, to pay that part of the purchase money payable at

the time of the application, into Court, and to execute a mortgage to secure the balance, in accordance with the conditions of sale. The motion was resisted on the ground that, pending the suit, the defendant, Luke Hallett, who claimed to be sole owner of the land, had sold to one Harris a right to cut timber on the land, which right Harris refused to release, and it was contended that Harris was not bound by the decree, because it was made by consent and because he was no party to the suit.

The sale took place on the 17th May, 1875, when it was expressly stated that Harris had no claim, notwithstanding his assertion to the contrary. The purchase money was payable as follows: 20 per cent on the day of sale, 30 per cent in one month thereafter, and the balance to be secured by mortgage, payable in three annual instalments, with interest at 6 per cent. The deposit at the sale was paid to the vendor's solicitors, but no further sum was paid. By mutual agreement between the parties it was subsequently agreed that the purchase money, instead of being paid into court or secured by mortgage, should be paid directly to the parties entitled. According to the affidavit of the purchaser's solicitor, it appeared that he searched the Registry office and found Harris's agreement on record, on 29th July, 1875. On the 10th of August he obtained from the solicitors of the plaintiff and defendants a consent to his obtaining a vesting order. Subsequently, on the advice of his solicitor, he decided not to act upon it, and required a conveyance, and a conveyance was accordingly carried into the Master's office by the purchaser, and settled by the Master on the 13th September, 1875. The purchaser's solicitor subsequently prepared a release for Harris to execute, and sent it to him for execution; but Harris refused to execute it, and the purchaser's solicitor, on the 21st October, 1875, notified the vendor's solicitor of the fact. Since that time nothing was done to procure the release.

Cassels, for the plaintiff.

Ewart, for the purchaser.

MR. HOLMESTED—I think the objection made by the purchaser to the title is well founded.

It was contended that the purchaser had waived the right to take this objection by reason of the great delay, and also by taking a consent to his obtaining a vesting order, and also by having the conveyance settled by the Master

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STREET v. HALLETT—MOODY v. TYRRELL.

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without having Harris made a party to it. I am of opinion that none of these circumstances can deprive the purchaser of his right to insist on the removal of the objection.

If he had actually accepted a vesting order or conveyance, the case of *Kincaid v. Kincaid*, 6 Prac. R. 93, and *Bull v. Harper*, ib. 36, would have been applicable. The mere fact that the parties to the suit consented that he should get a vesting order is a very different thing. With regard to the delay, it appears by the affidavit that it was expressly stated at the sale that Harris had no claim, notwithstanding his assertion to the contrary. The purchaser's solicitor, moreover, states that he was given to understand that Harris would execute a release when called upon to do so, and from this fact one can understand that he was induced not to make this claim of Harris a formal objection to the title at an earlier date; as soon, however, as he had definitely ascertained that Harris would not execute a release in October last, he notified the vendor's solicitor, and I do not find that he has done anything since which can fairly be said to be a waiver of the objection.

In the affidavit of the plaintiff's solicitor, it is stated that any claim Harris may have, he obtained from the defendant Hallett, and he believes that the plaintiff is not liable to pay Harris for the release, but that the defendants, other than Street, are the parties who are bound to get the claims released. It is this consideration which has probably induced the plaintiff's solicitor to come to the conclusion that, as between the plaintiff and the purchaser he was not bound to procure the removal of this objection to the title, but in this respect the plaintiff's solicitor has, I think, mistaken the practice. It is quite out of the question to suppose that a purchaser at a Chancery sale is to deal individually with each party to the suit, in order to procure the removal of objections to the title. On the contrary, the practice is perfectly well settled that the party having the conduct of the sale represents for the purpose of the sale, so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove or procure to be removed any objections which may properly be made to the title; and if, in order to do so, it is necessary that any part of the purchase money should be applied, it may become a question between the parties to the suit as to whose shares it should ultimately be paid out of; that is a matter, however, with which the purchaser has nothing to do, and must be adjusted by the parties themselves, or, if need

be, by the Court, on a proper application for that purpose.

As the parties in this case have agreed that the balance of purchase money shall be paid direct to the parties entitled, and not into court as provided by the conditions of sale, an agreement which they were competent to make, being all *sui juris*, I do not think the purchaser is in default, but is perfectly justified in withholding payment until the objection is removed; and if it cannot be removed, then I think the purchaser will be entitled to move to be discharged from his purchase, and to have his deposit refunded, or for the allowance of an abatement in his purchase money.

The present application is premature, and must be refused with costs.

MOODY v. TYRRELL.

Solicitor—Payment of money to solicitor.

The retainer of an attorney or solicitor to collect a demand, and to take such proceedings as he may deem proper to effect this object, gives him authority to receive the amount before or after suit, and to discharge effectually the party making the payment, unless the client restricts or terminates the authority given to his attorney or solicitor.

[January 21, 1876—*Blake, V. C.*]

Proceedings in this suit were commenced for the purpose of recovering against the estate represented by the defendant damages for breach of a covenant entered into by one Samuel White. On the 15th of March, 1873, by a consent decree it was declared that the plaintiff was entitled to be paid, by way of damages for the breach of this covenant, the sum of \$830, and it was ordered that the defendant should, within one month from the date of the decree, pay to the plaintiff the sum of \$830 and the costs, and in default of such payment that the estate of Samuel White should be administered. On the 16th of April, 1873, the defendant paid the solicitor of the plaintiff \$700, and on the 3rd of May following the sum of \$200, and on the 6th of August of the same year he tendered the plaintiff \$195.53 as the balance due. The solicitor for the plaintiff absconded without paying over the \$900 paid to him.

On the allegation that the payment to the solicitor was not a good payment, a motion was now made by the plaintiff under the liberty re-

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served in the decree, for the administration of the estate in question. The plaintiff had employed one Foster, his father-in-law, to look after the suit for him, and the defendant in resisting the motion, put in affidavits to show that Foster was told of the first payment at least to the solicitor, and neither he nor the plaintiff made any objection.

Hoyles, for the plaintiff.

J. A. Boyd, for the defendant.

BLAKE, V. C.—There is no doubt that no instructions were given to the defendant not to pay the money to the plaintiff's solicitor, nor to this solicitor not to receive the amount found due. I think the proper conclusion from the evidence is, that the plaintiff intended that his solicitor should receive the money for him whenever the defendant paid it. Charles McVittie, clerk of the plaintiff's solicitor, says, that at the date of the first payment he told the plaintiff the amount had been received, and that the defendant had promised to pay the balance shortly; and that Foster and the plaintiff's wife were also told of this payment. He says they expected the money would be paid to Whitley (the absconding solicitor). Foster says he understood the defendant was to pay the money into Whitley's office, and he heard that some of the money had been paid to Whitley, who would not settle until all the money was paid over.

I do not think there can be any doubt that, when a client instructs an attorney or solicitor to collect a demand he may have, he thereby empowers him to receive from the defendant payment of that which is handed over as a satisfaction of the claim, and that such payment is a good discharge to the debtor or defendant. By his employment he appoints him his agent to demand satisfaction in respect of the claim of his client; to take proceedings in case the demand be refused; to compromise if thought proper, and to receive the result of the litigation; and, as a consequence, effectually to discharge the person making the payment. In this respect I can find no difference between the position of an attorney and solicitor.

Mr. Pulling says, p. 104: "The attorney for the plaintiff in an action is the proper person to whom payment or tender of the debt, or damages or costs, should be made. And the attorney on the record is deemed the proper hand to receive the fruits of the execution, and to enter satisfaction after payment; and by his

general authority in the action he may remit the damages, or, as it is said, acknowledge satisfaction, though nothing is paid." I think Mr. Pulling is incorrect in the last statement he makes. In Archbold's Practice (vol. i., p. 87, 12th ed.) it is said, in speaking of the power of an attorney, "if he is authorized to do a particular act, he may do everything that is necessary for the accomplishment of it. Where a party is sued for a debt, payment or tender of it to the plaintiff's attorney is the same as payment or tender to the plaintiff himself, and the attorney's receipt binds the client." This rule seems to date back for many years. In *Morton's case*, 2 Shower, case No. 115 p. 140, it is said: "Suppose that the sheriff die or become insolvent, the plaintiff must not lose his debt; otherwise, if the money had been paid to the plaintiff's attorney upon record, for that would have been a payment to the plaintiff himself." Some years after that we find the very strong case of *Powell v. Little*, 1 W. Bl. 8, "The plaintiff had privately countermanded his attorney in this cause. The defendant afterwards pays him the debt in dispute for the use of the plaintiff, and the Court held it a good payment, because the attorney was changed without leave obtained from the Court."

In *Crozer v. Pilling*, 4 B. & Cr. 28, *Morton's Case* is approved of. "F. Pollock now moved for a new trial. First, he contended that the debt and costs ought to have been paid or tendered to the plaintiff, and not to his attorney upon the record. [Upon this point the Court intimated a clear opinion that the attorney upon the record was the proper person to receive payment of the debt and costs, and that the tender was properly made to him.]" Bayley J., says, "In *Morton's Case* it is laid down by the Court that a defendant is not bound to pay money to a sheriff, but to the party, and it was said that it was sufficient if the money was paid to the plaintiff's attorney upon the record, for that would have been a payment to the plaintiff himself." In *Savory v. Chapman*, 11 Ad. & El. 836, Littledale, J., says: "The authority of an attorney in general is determined after judgment, but he may still sue out execution and receive the money, and his receipt is then the same as that of the principal; and according to 1 Roll. Ab. 291, tit. Attorney (M.), cited in Com. Dig. Attorney (B. 10) he may, after payment, acknowledge satisfaction on the record." In *Mason v. Whitehouse*, 4 Bing. N. C. 692, it was held that "a demand by the attorney of the party, without an express power of attorney,

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was sufficient," and an attachment issued for the non-payment of the sum thus demanded was allowed to stand. The judgment of the Court in *Bevins v. Hulme*, 15 M. & W. 88, seems conclusive as to the authority of the attorney. The Court there says : "We agree that the original retainer is to be presumed, *prima facie*, to continue as long as by law it might, as argued by Mr. Prideaux on the authority of Lord Ellenborough's *dictum* in *Brackenbury v. Pell*, 12 East 588 ; although we think he was right in contending that the original retainer was not determined by the judgment, but continued afterwards, so as to warrant the attorney in issuing execution within a year and a day afterwards, in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution, the weight of prior authorities being against the decision of Heath, J., in *Tipping v. Johnson*," 2 B. & P. 357. It is to be observed that the Common Law Courts, while thus laying down the law as to the power of an attorney, do not differ at all from the practice found in Courts of Equity, as to the power of a solicitor to bind his client by a receipt of mortgage money. This is shown in the case of *Sims v. Brutton*, 5 Ex. 802, decided by the Court of Exchequer, which agrees with the decision of Lord Hatherley, in the case *Withington v. Tate*, L.R., 4 Chy. 288. Upon the facts found in this case it cannot be taken that it was any part of the business of the defendants, as solicitors to receive repayment of the mortgage money, and lay it out again at interest. For that purpose there must be some authority, either as express or applied. *Wilkinson v. Candlish*, 5 Ex. 91, decided that a solicitor has no authority, from the mere possession of the mortgage deed, to receive either principal or interest."

In *Broudillon v. Roche*, 27 L. J., Chy. 681, the present Lord Hatherley considered the position of a solicitor as to the receipt of money on behalf of his client ; and after reviewing the authorities, placed the matter upon an intelligent footing. He quotes with approval the language of Lord Justice Turner in *Viney v. Chaplin*, 27 L. J. Chy. 434 : "I take it to be settled that a solicitor is not by virtue of his office entitled to receive purchase moneys, even although he may have possession of the deed of conveyance ; and it would be strange if he were, for it is no part of the ordinary duty of a solicitor to receive money belonging to his client, and the deed of conveyance comes into his hands for a wholly different purpose ;" again he approves of this language, "that it was no part of the

ordinary business of a solicitor to receive purchase money, and he could not fix Plowman with the consequences of Roche's receipt, being unable to draw any distinction between purchase money and money due on mortgage." So that the power to receive money appears to rest on the object for which the attorney or solicitor was retained.

I think it is clear that when an attorney or solicitor is retained to collect a demand, and to take such proceedings as he may deem proper to effect this object, that it embraces the right to receive the amount from the defendant before or after suit, unless or until the plaintiff restricts or terminates the authority given to his solicitor ; that by this employment the solicitor is appointed the agent of the plaintiff to demand and receive the claim, and to discharge effectually the party making the payment. This right does not allow the attorney or solicitor to receive money of the client because he may happen to have deeds, mortgages, or papers in his hands belonging to him, unless the client instructs the solicitor to receive the money which may be paid him. It does not follow from this conclusion that a person ordered to pay money into Court is effectually discharged by paying it to a solicitor ; nor that money once paid into court can be paid out otherwise than personally to the party entitled to receive it, or to his agent duly appointed under a power of attorney. In the first cases the court requires an exact fulfilment of the terms of its decree, and in the latter it sees that the money goes directly to the hand entitled to receive it. In some cases the Court in England appears willing to relax somewhat this rule : *Ex p. De Beaumont*, 13 Jur. 354 ; *Waddilove v. Taylor*, 13 Jur. 1023, *Mansfield v. Green*, 1 W. N. 229.

In the present case the solicitor was retained by the plaintiff to collect from the defendant the demand, the subject of suit. The solicitor was bound to take steps that would lead to this result, and was entitled at any time to receive from the defendant that which he was employed to collect. This power was never withdrawn, and, in the exercise of it, he received \$990 of the claim, and to that extent he effectually discharged the defendant. The plaintiff cannot therefore collect this from the person who has paid it ; and as these proceedings are taken to endeavour to effect this object, the application must be dismissed with costs.

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RE BAZELEY—COX V. KEATING.

[Chy. Cham.

RE BAZELEY.

Infants—Application of property for maintenance—29 Vict. cap. 17, and 33 Vict. cap. 21 sec. 3.

33 Vict. cap. 21 sec. 3 (O.), only authorizes the application of the interest on insurance moneys, apportioned to infants under 29 Vict. cap. 17, for the maintenance of the infants. The principal can, under these acts, only be applied for advancement, but under the general jurisdiction of the Court may be applied for maintenance.

[February 7, 1876—Proudfoot, V.C.]

The deceased father of the infants had insured his life under 29 Vict. cap. 17, for the benefit of his wife and children. The amount apportioned to the children was \$1,000, and was held by a trustee for them. It was shown that the income had already been anticipated to the extent of \$100, and that the necessities of the children required payment of a portion of the principal.

Moss now applied on behalf of the children for an order authorizing the application of a portion of the principal for the maintenance of the infants.

PROUDFOOT, V. C.—I do not think that I could give any direction involving the application of the principal for maintenance if the case depended on 33 Vict. cap. 21 sec. 3. That Act only authorizes the application of the interest for maintenance. The principal may be applied for advancement.

But the petitioner may amend his petition, asking relief under the general jurisdiction of the Court, and when that is done an order will be made.

Under the circumstances of this matter I think it would be a proper direction to sanction the application of \$100 for the immediate necessities of the children, and application may be made again if the necessity continue. The costs of this application to be paid out of the funds.

COX V. KEATING.

Replication—Introduction into replication of matter by way of confession and avoidance—Order 121.

Replication held irregular which contained new matter by way of confession and avoidance of the defence set up by defendant's answer. Such matter should be introduced by way of amendment to the bill.

[February 15, 1876.—Referee.]

This was a suit for specific performance by a vendee against his vendor. By the third paragraph of the defendant's answer, it was alleged that by the terms of the contract the plaintiff covenanted to pay the purchase money on the 1st October, 1873, and that the same had not been paid. The plaintiff, in his replication, admitted this allegation, and set up certain facts in excuse for his default. He alleged in effect that he attended the defendant and was prepared to pay the purchase money, and that he did not do so because he found an incumbrance out on the property, which the defendant refused to remove. The defendant in his answer alleged that the petitioner had executed and registered a mortgage on the property, and he claimed, by way of cross relief, that in the event of the sale not being carried out, the plaintiff might be ordered to release the lands from the mortgage so executed by him. In his replication, the plaintiff admitted the making of the mortgage, but he set up that he afterwards procured it to be discharged.

Hoyle, for the defendant, now applied to take the replication off the files for irregularity, or to strike out the new matter thus introduced by way of confession and avoidance of the facts alleged in the answer.

Mr. Perkins (Beatty, Miller & Lash) for the plaintiff. The matter objected to is within the meaning of Order 151, which provides that admissions in the replication may be made, "with such qualifications as may be necessary or proper for protecting the interests of the party making the admissions."

MR. HOLMESTED.—I do not think that this replication complies with, or is within the spirit of Order 151. The system of pleading which prevails in this court aims at producing an issue between the litigants, in the course of at most three pleadings, viz., bill, answer and replication, or in certain cases, in bill and answer or demurrer alone. There is no provision in our procedure for any fourth pleading after replication, as there is at law; consequently the result

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of alleging new facts by way of replication would be to deprive the defendant of any opportunity to answer them or even to take issue upon them. It has always been the practice heretofore, where it was desired to meet the defence set up in an answer by the allegation of facts in confession and avoidance, to introduce such facts by way of amendment to the bill. The defendant has then an opportunity of answering the facts so introduced.

The qualifications with which admission may be made in the replication are not such as introduce new matter, but are only such as may be

thought necessary for restricting the admission within certain limits, *e. g.*, that the admission is made for the purpose of the suit only, or that it is made with reference only to a certain specified part of any given paragraph of the defendant's answer.

This replication must be set aside with costs, the plaintiff to have leave to file a new application within ten days.

Master's Office.]

KENNEDY V. BROWN.

[Master's Office.]

MASTER'S OFFICE.

KENNEDY V. BROWN.

Costs—Higher or lower scale—Subject matter involved in the suit.

A bill was filed for the specific performance of a contract for sale of land, for a sum less than \$150. Before suit the plaintiff, the vendee, had entered upon the land, and made improvements upon it, which increased its value to more than \$200.

Held, that the "subject matter involved" in the suit was more than \$200, and that the plaintiff was therefore entitled to costs according to the higher scale.

[February 15, 1876—*Taylor, Master.*]

The bill in this suit was for specific performance of an agreement, whereby defendant agreed to sell to plaintiff a certain parcel of land for less than \$150. After the agreement, and before bill was filed, plaintiff entered upon the land and erected a house upon it, which increased the value of the land to more than \$200. Decree was for specific performance, and contained a reference to the Master, to inquire how much was due to defendant, and directed defendant to pay to the plaintiff his costs of suit. The

Master found that the amount due was less than \$200.

Hoyles, for defendant, contended that under the above circumstances plaintiff was only entitled to costs upon the "lower scale."

J. S. Ewart, for plaintiff, contended that the value of the land, together with the building, was the test.

MASTER, TAYLOR—The plaintiff seems entitled to have his costs taxed upon the higher scale. What is "the subject matter involved?" The land as it stood at the date of filing the bill. It is true, that the purchase money agreed to be paid for it, when brought some years before, was less than \$200; but in the meantime improvements have been made, and the value of these added to the land, make it of greater value than the \$200. These are all involved in the present suit.

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RE ATTORNEYS—DOOLAN V. MARTIN.

[C. L. Cham.

COMMON LAW CHAMBERS.

RE ATTORNEYS.

Attorney and client—Nominal plaintiff.

A client who is merely a nominal plaintiff, being in this case the person in whose name an election petition had been filed, and who lent his name for the purpose of convenience, and was not held responsible by the attorney for his costs, is not entitled to an order on the attorney for delivery of his bill of costs, &c.

[April 1, 1876.—*Mr. Dalton.*]

A summons was obtained on behalf of the petitioner in two recent appeals against the return of the sitting member for Kingston, for the delivery to him by his attorneys of their bills of costs against him, and against the respondent, and for the return of documents with which they had been entrusted.

Delamere shewed cause. It is shewn by affidavit that the applicant is not a client of the attorneys in question, and that he had never entrusted them with any moneys or documents. It is also shewn that the attorneys have never sought in any way to make the applicant liable for any costs, and they do not now seek to do so.

Creelman, contra.

MR. DALTON.—I think the summons must be discharged. It has been shewn that the applicant did not himself advance the money by which the petition was carried on; and was in no way liable for the costs incurred in connection therewith. In such a case, the petitioner is merely a nominal plaintiff, who lends his name for purposes of convenience to the parties who contribute to the fund by which the expenses of the petition are met.

Summons discharged with costs.

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Staying proceedings until costs of former action paid—Trespass—Malicious prosecution.

The plaintiff, in a previous action, sued in trespass for assault and false imprisonment, but was nonsuited, on the ground that her remedy, if any, was by action for malicious prosecution. She accordingly sued in the latter form of action. The defendant then obtained a summons to stay all proceedings until the costs in the first action should be paid, on the ground that this suit was brought for the same cause of action. This summons having been made absolute, the plaintiff appealed. The Chief Justice of Ontario, before whom the appeal was heard, allowed the appeal and set aside the order staying proceedings, holding that trespass for assault and false imprisonment and case for malicious prosecution are clearly not the same cause of action.

Sembler, that the jurisdiction to stay proceedings in cases of this kind should be sparingly used.

[April 7, 1876.—*Mr. Dalton—Harrison, C.J.*]

This was an action brought by the plaintiff to recover damages for malicious prosecution.

The declaration alleged that the defendant falsely and maliciously and without reasonable or probable cause, appeared before a justice of the peace and charged the plaintiff with having feloniously stolen certain goods, and upon that charge procured the arrest and imprisonment of the plaintiff.

It appeared from the plaintiff's affidavit filed, that before the prosecution was instituted, the defendant procured a thorough search and examination to be made by one Bernard Trainer, the chief constable at Goderich, both of the premises occupied by the plaintiff and by the defendant, and was then informed by Trainer that there was no reason for charging the plaintiff with the offence; that this search was made during the afternoon, and at a late hour at night on the same day; that defendant, without any grounds whatever for suspecting the plaintiff of the offence, procured another constable, placed a warrant in his hands, and personally directed him to arrest and imprison the plaintiff; that she was arrested at a late hour on Saturday night, taken to goal, and kept there till the fol-

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lowing Monday, when she was brought before justices of the peace who dismissed the charge; and that no evidence whatever was given before the justices to attach any suspicion of guilt to the plaintiff.

This was the second action brought by the plaintiff. It was commenced by writ dated 14th February, 1876. The first action was commenced by writ dated 21st June, 1875. In the first action the plaintiff declared simply in trespass, and was nonsuited on the objection of the defendant's counsel that the remedy, if any, of the plaintiff was for malicious prosecution.

It was at the trial contended by the plaintiff's counsel, that trespass would, on the facts, lie against the defendant; and his counsel was so strongly of that opinion that he did not ask for an amendment at the trial by adding a count for malicious prosecution, which would probably have entailed the expense of paying the costs of the day and of putting off the trial, and for these reasons alone, as sworn by the plaintiff's attorney, no amendment was asked.

It was not stated in the affidavits whether any motion was afterwards made against the nonsuit. The defendant taxed his costs of defending that suit at \$111.

A summons was obtained from Mr. Dalton to stay proceedings until the costs of the first action should be paid, on the ground that the second action was brought for the same cause of action as the first.

The affidavits filed in support of the summons, shewed that the plaintiff was a person without property or other means of paying the costs which she had already incurred.

Mr. DALTON, after argument, made the summons absolute.

From this decision, the plaintiff appealed.

Oster, for the appeal.

W. R. Mulock, for the defendant.

HARRISON, C. J.—In actions of ejectment where a matter of title has been fully investigated in a Court of law, and the plaintiff has failed to establish his claim, it has long been the practice of the Courts to interpose in order to prevent the defendant being put to great, and it may be ruinous expense, in defending his possession in a second action until the costs of the first pro-

ceeding have been paid : *per Bovil*, C. J., in *Tichborne v. Mostyn*, L. R. 8 C. P. 34. There is now a section in the Ejectment Act, which, in express language, confers such a power : see sec. 76, Harr. C. L. P. Act, 578 and notes.

The reason the Courts stay proceedings in a second ejectment is to prevent vexation, for it is in the power of a person to bring as many ejectments as he pleases, unless he has been enjoined to the contrary by the Court of Chancery, therefore, as said by Lee, C. J., in *Doe d. Duchess of Hamilton v. Atherly*, 7 Mod. 420 : “Where a plaintiff has had judgment in a former ejectment against him, and is for bringing a new one, we cannot deny it him absolutely, but as it is as a creature of the Court and an equitable proceeding, we grant it to him upon paying the costs and making the recompense for the vexation he had caused in the prior ejectment.”

In general, the practice as to staying proceedings in a second action until the costs of a former action for the same cause are paid, is confined to actions of ejectment, which has always been considered as peculiarly the creature of the Court : *per Jervis*, C. J., in *Danvers v. Morgan*, 17 C. B. 533. Still the Court has jurisdiction to prevent the abuse of its process by vexatious actions. But this summary jurisdiction should be sparingly exercised, as it deprives the party whose action is stopped of the right to try his cause, and if necessary to carry it to the highest tribunal : *per Mellor*, J., in *Cobbett v. Warner*, L. R. [2 Q. B. 108, 110].

It has generally been exercised where the party has previously failed in the course of litigation, and then, without paying the costs of the former action, has vexatiously and oppressively brought a fresh action against the same party, or some one identified in interest with him, for the same, or what is substantially the same cause of action : *Ib.*

There is no general rule that this course is to be adopted whenever the costs of a former litigation are unpaid. But where that is the case, and the plaintiff fails to satisfy the Court that there is a real and probable cause of action, though he failed to establish it in the former litigation, the proceeding is so *prima facie* vexatious and harassing that the Court ought to interfere to stop it till the former costs have been satisfied : *per Mellor*, J., *Ib.* 110. But where the failure to succeed in the former litigation has arisen from a technicality of some kind, so that it cannot be

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said that he failed on the merits, it is not usual to stay the second action, even when for the same cause : *Hoare v. Dickson*, 17 C. B. 177; *Danvers v. Morgan*, 17 C. B. 530; *Davis v. Weller*, 5 Prac. R. 150.

In *Moulton q. t. v. Bingham*, 2 T. R. 511, note, where in an action for a penalty, the plaintiff, on some ground, was nonsuited, and brought a second action for the same cause, the plaintiff being willing on the second action to pay the costs of the first, was ordered to pay them, in default of which, the rule to stay the proceedings in the second cause was directed to be made absolute.

In *Baldwin v. Richards*, 2 T. R. 511, note, a second action for malicious prosecution was stayed until the costs of judgment, as in case of nonsuit, were paid in the former action.

In *Weston et al. v. Withers*, 2 T. R. 511, which was a second action of trespass for taking the plaintiffs goods as a distress for rent, the second action was stayed, although the plaintiff sued in *forma pauperis*, being a prisoner in the King's Bench.

In *Grosvenor v. Cafe*, cited in *Melchart v. Halsey*, 2 W. Bl. 741, where the plaintiff brought trover to try a question of bankruptcy, the merits were fully gone into, and judgment given for defendant. Afterwards an application was made to the Court of Chancery, which concurred in the precedent opinion, and then plaintiff brought a new action for money had and received, and not trover, lest the former action in trover should be pleaded in bar, to try the same question of bankruptcy over again. The second action was stayed ; *Wilmot, C. J.*, saying, "before the Court permits this, you shall pay your costs. The general rule is, indeed, otherwise, but this depends on the particular circumstances of the present case."

In *Bass v. Firmen*, 1 Ld. Rayd. 697, where the plaintiff in his first action was nonsuited for variance between his declaration and his proof, the Court refused to stay a second action for the same cause, "because the merits did not come in question in the trial upon which he was nonsuited, but he was only upon the variance."

In *Melchart v. Halsey*, 2 W. Bl. 741, the second action for the same cause was stayed, where the plaintiff in the first action was nonsuited, and the nonsuit, after motion, sustained by the Court (*per Grey, C. J.*, upon *Grosvenor v. Cafe* being cited,) "as many circumstances

concur in this case as in that to shew the plaintiff ought to be satisfied with the determination of the former action." And per Blackstone, J., "I think in all cases where the merits have been fully heard and determined, it would be a good rule that it should not be reheard in another action till the costs of the former be paid."

In *Leversedge v. Goode*, 2 Dowl. P. R. 141, where a plaintiff was *non prossed* in replevin, and afterwards brought trespass, Patterson, J., refused to stay the proceedings, saying, "the judgment of *non pros.* is not a judgment on the merits, and therefore I incline to think it is no answer to the trespass, for the defendant may have committed a trespass under the distress which cannot be justified. * * * I do not think the cases have gone so far as the present application."

In *Hoare v. Dickson*, 7 C. B. 164, where the plaintiff in an action of slander had been nonsuited upon the merits, and afterwards brought a second action against the defendant substantially for the same supposed cause of action, though slightly varying the words charged to have been spoken, the second action was stayed till the costs of the former action were paid.

In *Danvers v. Morgan*, 17 C. B. 530, the Court refused to stay the second action of trespass for the same cause, because the failure arose in the first action by reason of want of notice of action and not on the merits.

In *Prouse v. Loxdale*, 2 B. & S. 896, which was a second action for the same libel, although the first did not fail after a trial on the merits, but on the voluntary conduct of the plaintiff's counsel, who, having heard the defendant's case and reply, chose to withdraw the case from the jury rather than have a verdict against him, the second action was stayed as being vexatious and oppressive until payment of the costs of the first action.

An exception appears to exist where the action is not for trespass or malicious prosecution, or other action in the case, but for the recovery of a debt : *Rashley v. Poole*, 3 D. & R. 53. See also *Hodgson v. Graham*, 26 U. C. Q. B. 127.

The principles of the foregoing cases are as applicable to suits in equity, as to actions at law : *Street v. Ryckman*, 1 Gr. 215; *Follis v. Todd*, 1 Chy. Ch. 288; *Casey v. McColl*, 3 Chy. Ch. 24.

In *Leversedge v. Goode*, 2 Dowl. P. R. 142, Patteson, J., said, "unless the first and second

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actions are *clearly* the same, I cannot say that the second is vexatious." See further, *Wade v. Simeon*, 1 C. B. 610; *Bell v. Cuff*, 4 Prac. R. 155.

If this action were trespass like the former action, I should have little difficulty in holding that it is for the same cause, and so *prima facie* vexatious and oppressive. But the difficulty is, to hold on the authorities that an action of trespass and an action on the case for malicious prosecution, are actions for the same cause, or substantially for the same cause.

I am aware that it is a common practice to place in the same declaration a count for trespass and a count for malicious prosecution, so that in the event of failure to recover under the one, there may be a recovery under the other count of the declaration. Had the declaration in this case contained both counts, there would have been no need of bringing the second action.

But although a plaintiff may, in the same declaration, insert a count in trespass and a count in case, in other words, join several causes of action, there is no authority that I have been able to find which decides that he shall do so at the peril of being prevented from afterwards suing in case till he pay the costs of the particular action in which he failed. Nor is there any authority for holding that in the event of failure at the trial to sustain his count in trespass, he shall, under a similar peril, apply to add a count in case, which, in all probability, may not be ordered except on payment of costs, and he or she, as here, be unable to pay costs. The mere want of money to pay cost of litigation is no reason why a person having a cause of action, shall not be allowed to assert it.

It is no reason for preventing a person trying a cause of action which he *has*, that he or she might have joined the cause of action with a supposed cause of action which he or she *had not*.

It is not at all like the case of a plaintiff suing for libel or slander being nonsuited, and afterwards, without paying the costs of the first action, again suing with a slight change of words for substantially the same libel or slander.

An action for assault and false imprisonment, is not the same thing as an action for malicious prosecution. They are essentially different causes of action. They cannot, therefore, although arising out of the same state of facts,

be said to be the same or substantially the same cause of action: *Guest v. Warren*, 9 Ex. 379; *Hunt v. McArthur*, 24 U. C. Q. B. 254. It is because they are different causes of action that this plaintiff failed in her first action. The objection by the defendant was then that her remedy was case, not trespass. And now when she brings case, it is attempted to be objected by the same defendant, that both are the same cause of action.

I think trespass for assault and false imprisonment, and case for malicious prosecution, are clearly not the same cause of action. This being so, a jurisdiction, which should be sparingly exercised in any case, ought not to be exercised in this case.

I do not at all see my way on the authorities to the exercise of the jurisdiction which the defendant invokes on the facts before me.

In my opinion the appeal must be allowed, the order of Mr. Dalton rescinded, and the summons discharged, all without costs.

Appeal allowed.

LAIRD V. STANLEY.

A. J. Act, 1873, sec. 24.—Re-examination.

An *ex parte* order will not be granted for the re-examination of a party under sec. 24 of Administration of Justice Act, 1873, and special circumstances must be shewn.

[April 15, 1876.—*Mr. Dalton.*]

G. B. Gordon, applied *ex parte* for an order to re-examine the defendant.

MR. DALTON.—I cannot grant an *ex parte* order on an application for re-examination of a party, although this can be done, according to the practice, when a party is sought to be examined for the first time. The plaintiff must take a summons, and he must also shew special circumstances, which, under the re-examination, is necessary.

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Division Courts—Jurisdiction—Splitting cause of action—Unsettled account over \$200, but under \$400—39 Vict. cap. 15, sec. 2.—Abandoning excess—Statute affecting suits commenced before its passing, but tried after.

The plaintiff, in a suit in a Division Court brought before the passing of 39 Vict. cap. 15, sued for \$30 due as a balance of an account for board for self and horse, which appeared at the trial to be a balance of an unsettled account exceeding \$200. He also sued for \$82 for board for self and horse for a subsequent period, and abandoned the excess of \$12 over \$100. On objection being taken to the jurisdiction of the Division Court, the Judge allowed an amendment. The plaintiff then altered his claim, reducing it to the \$82 only, and the case was again tried and judgment reserved, whereupon application was made for prohibition.

Held. 1. That the Division Court had no jurisdiction, independently of the 39 Vict. cap. 15, sec. 2, which gives jurisdiction in cases of unsettled accounts under \$400; but

2. That under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was therefore no necessity for any amendment.

3. A plaintiff, to give a Division Court jurisdiction where his claim is in excess, must abandon the excess in his claim, and cannot wait until the hearing, and then do it.

[April 18, 1876—*Harrison, C. J.*]

The plaintiff was the assignee in insolvency of one George Robson.

On the 13th of December, 1875, George Robson sued Joseph Small Ryan in the first Division Court of the County of Wentworth, to recover \$100.

The claim was thus stated on the summons:—

1875. Sept. 4., to balance due for board of self and horse on settlement this day	\$ 30
Nov. 25. Board of self and horse from 4th Sept. to 25th Nov., 11 weeks and 5 days.....	82
	\$112
Excess above \$100 abandoned.....	12
	\$100

The first trial took place on the 10th of February, 1876. It then appeared that there had not been any settlement between the plaintiff and defendant on the 4th of September, 1875, or at any other time, and that the amount of the plaintiff's account against the defendant was \$230, being for the board and lodging of the defendant and keep of his horse from the 14th of April, 1875, to 25th of November, 1875.

Objection was made by the defendant that the Judge of the County Court had no jurisdiction

to try the cause, as it appeared by the evidence that the plaintiff was suing for a balance of an unsettled account, in the whole exceeding \$200.

The learned Judge sustained the objection on the day of trial, and refused further to proceed with the trial. But on the following day he, at the instance of the plaintiff, granted a summons requiring the defendant to shew cause why he, the learned Judge, should not review his decision upon the ground that the Court had jurisdiction, or why the plaintiff should not be allowed to amend his claim by abandoning all amounts of account previous to 5th of September, 1875.

The summons was afterwards argued, and on 21st of February, 1876, made absolute. The then plaintiff thereupon amended his particulars of claim to make them read as follows:—"1875. Nov. 25, To board of self and horse feed, from 4th of Sept., 1875, to 25th of Nov., 1875, 11 weeks and 5 days, \$82."

The case afterwards, on the 22nd February, 1876, under the amended claim, came on for hearing before the learned Judge, who then permitted the present plaintiff to become plaintiff; heard the evidence adduced on both sides, and reserved his decision.

On the 31st of March, 1876, the defendant obtained from a Judge in Chambers a summons calling on the plaintiff to shew cause why a writ of prohibition should not issue, directed to the County Judge, to prohibit the proceeding in the Division Court on the ground of want of jurisdiction. The summons was granted on an affidavit disclosing the foregoing facts.

W. R. Mulock shewed cause.

Meyers supported the summons.

HARRISON, C. J.—An application for prohibition to an inferior Court ought not to be granted unless it be made clearly to appear that under no view of the facts has the inferior Court jurisdiction. See *Kimpton v. Willey*, 1 L. M. & P. 280, 288, 295; *The Mayor of London v. Cox*, L. R. 2 H. L. C. 239; *In re Charkieh*, L. R. 8 Q. B. 197; *Fleming v. Livingstone*, 6 Prac. R. 63.

An inferior tribunal cannot give itself jurisdiction by deciding without evidence. On the other hand, it cannot refuse to go into the evidence in order to ascertain whether it has or has not jurisdiction. If it takes upon itself jurisdiction without evidence, or after refusing to go into evidence it turns out that there was no

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jurisdiction, prohibition should be granted : *In re Brown and Cocking*, L. R. 3 Q. B. 672. See further *Elston v. Rose*, L. R. 4 Q. B. 4.

There is general jurisdiction in a Division Court to hear and determine "all claims and demands of debt, account, breach of contract, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100": Consol. Stat. U. C., cap. 19, sec. 55, sub-sec. 2.

A judgment of the Court upon a suit brought for a balance of an account, is a full discharge of all demands in respect of the account : *Ib.*, sec. 60.

But these sections are by sec. 79 subject to the following provisions :—

1. That a cause of action shall not be divided for the purpose of bringing the same within the jurisdiction of a Division Court.

2. That no greater sum than \$100 shall be recovered in any action in a Division Court for the balance of an unsettled account.

3. That no action for any such balance shall be sustained where the unsettled account in the whole exceeds \$200.

On 10th February, 1876, the Legislature of Ontario passed "an Act to amend the Division Courts' Act" (cap. 15), which, among other things, provides that sec. 59 of Consol. Stat. U. C., cap. 19, is amended by striking out the words "two hundred" in the last line, and by substituting therefor the words "four hundred."

So that from and after 10th February, 1876, the third stipulation above mentioned is to be read as follows :—"That no action for any such balance shall be sustained where the unsettled account in the whole "exceeds \$400."

It was argued by Mr. Mulock that as the case in the Division Court, although commenced before 10th February, 1876, was not tried till that day, and as the unsettled account in the whole is clearly less than \$400, there was, under any circumstances, jurisdiction to try it, and to make all necessary amendments.

The first stipulation in sec. 59 of Consol. Stat. U. C. cap. 19, which demands attention is, that "a cause of action" shall not "be divided into two or more suits," for the purpose of bringing the same within the jurisdiction of a Division Court. The words "cause of action," as used in this section, mean "cause of one action," and are not

to be limited to an action on one separate contract. This was so held in *Re Aykroyd*, 1 Ex. 479, under a similar statute in England, and ever since that case has been a leading authority on the point.

The old rule was, "that if there be one entire contract above forty shillings, and a man sue for it in a Court Baron, severing it into divers small sums under forty shillings, a prohibition shall be granted, because this is done to defraud the Court of the King: 19 Hen. VI. 54; 1 B. & Ad. 673, note.

It was long since held as follows :—"If there be several contracts between A. and B. at several times for several sums, each under forty shillings, and they do all amount to a sum sufficient to entitle the Superior Court, they shall be there put in suit, and not in a Court which is not of record": *Anonymous*, 1 Ventris 65.

So in *Girling v. Alders*, 1 Ventris 73, it was said :—"In a prohibition to the Court of the Honour of Eye, the case was one contracted with another for divers parcels of malt, the money to be paid for each parcel being under forty shillings, and he levied divers plaints thereupon in the said Court, wherefore the Court here granted a prohibition, because, though they be several contracts, yet for as much as the plaintiff might have joined them all in one action, he ought so to have done, and sued here, and not put the defendant to an unnecessary vexation, no more than he can split an entire debt into divers debts to give the inferior Court jurisdiction *in fraudem legis.*"

Where a tradesman supplies a customer with articles of the same description for a length of time, his claims in respect to them become as it were amalgamated into one debt, and become for the purposes of the section the entire cause of action, which cannot for the purpose of two or more suits be divided : *In re Aykroyd*, 1 Ex. 479. Wherever there is in effect but one demand arising out of one state of things, although there be several items in the demand, so long as the items are of a common character, there is, for the purposes of the section, but one cause of one action. See *Wood v. Perry*, 3 Ex. 442; *Light v. Lyons*, 7 U. C. L. J. 174, and Irish cases noted in 8 U. C. L. J. 67. See also Copinger's County Court Practice in Ireland, 61. The only case at variance with this construction of the Act is, *Rex v. The Sheriff of Herefordshire*, 1 B. & Ad. 672, but it is not reconcilable with *Re Aykroyd*, 1 Ex. 479, and must be considered as overruled. See *Kimpton v. Willey*, 1 L. M. & P. 280, 285.

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The rule is of course inapplicable where the contracts or items of account are of a wholly different nature, as where one contract was for the price of a horse, and another for goods sold and delivered, and a third for rent: *Neale v. Ellis*, 1 D. & L. 163; *Kimpton v. Willey*, 1 L. M. & P. 280; *Brunskill v. Powell*, 1 L. M. & P. 550.

It is not a dividing or splitting of actions to bring distinct plaints where, in a superior Court, there would necessarily be two or more counts. See *Wickham v. Lee*, 12 Q. B. 521, 526; *Kimpton v. Willey*, 9 C. B. 719; 1 L. M. & P. 280; *Bousey v. Wordsworth*, 18 C. B. 325; *McRae v. Robins*, 20 C. P. 135; *Richards v. Martin*, 23 W. R. 93.

It appears to me on the authorities that plaintiff's claim for board of the defendant and keep of his horse, from week to week, from April, 1875, to November, 1875, is, as disclosed by the evidence, all one cause of action—one account—within the meaning of the Act, and exceeds \$200.

The next enquiry is, whether upon the evidence it can be said to be "an unsettled account."

An unsettled account is an account, the amount of which is not adjusted, determined, or admitted by some act of the parties, such as by the giving of a note, a mutual stating or balancing of the account, or fixing the amount due: *In re Hall v. Curtain*, 28 U. C. Q. B. 533. See further *McMurtry v. Munro*, 14 U. C. Q. B. 166; *Wallbridge v. Brown*, 18 U. C. Q. B. 158.

It is not the less an unsettled account because there have been payments made generally on account, which reduce the aggregate amount of the account from a sum exceeding \$200 to a sum less than \$100. See *Avards v. Rhodes*, 8 Ex. 312; *Wough v. Conway*, 4 C. L. J. N. S. 228; *In re Judge of Northumberland and Durham*, 19 C. P. 299. The case of *Miron v. McCabe*, 4 Prac. R. 171, which decides the contrary, is overruled, and no longer to be taken as law. See per *Wilson, J.*, in *In re Hall and Curtain*, 28 U. C. Q. B. 533.

The question now is, whether, independently of the act of last session, the plaintiff having originally stated a claim within the jurisdiction of the Division Court, and a claim in excess of the jurisdiction of the Division Court appearing on the evidence, it was in the power of the plaintiff at the hearing to abandon all claim to recover anything prior to 5th September, 1875, so as to reduce the demand to \$85 at most, and sue for that amount only in the Division Court.

There is nothing, according to the general principles of law, to prevent a person having a pecuniary demand against another, either wholly or in part, at any time abandoning it.

If a man, having a demand against another for a certain amount, properly the subject of one suit, sue in a superior Court of law for an amount less than his whole demand, he thereby abandons the excess, and never afterwards can sue for the excess in any Court of Justice: *Lord Bagot v. Williams*, 3 B. & C. 235. See also *Dunn v. Murray*, 9 B. & C. 780. But the mere fact of suing for a portion of an entire demand in a Court of inferior jurisdiction is not *per se* an abandonment of the excess: *Vines v. Arnold*, 8 C. B. 632. Some *act* of abandonment of the excess on the part of the plaintiff would therefore appear to be necessary: *Isaac v. Wyld*, 7 Ex. 163.

The English County Courts' Act, 9 & 10 Vict. cap. 95, sec. 63, from which sec. 69 of Consol. Stat. U. C. cap. 19, is in part taken, provided that "any plaintiff having a cause of action for more than £20 (the then limit of the jurisdiction of the County Courts in England), for which a plaint might be entered under this Act, if not for more than £20, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding £20, and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly."

It is remarkable (as pointed out in note l. to p. 30 of Mr. O'Brien's useful work on the Division Courts' Act), that the plaintiff's right of abandoning the excess for the purpose of giving jurisdiction, is nowhere expressly given by our Division Court Act, except in section 205, which appears to refer exclusively to proceedings against absconding debtors.

The right of abandoning the excess in all cases was recognized in rule 69 of the Division Court Rules of 1854, in the following terms:—"Where the excess is abandoned it *must* be done in the first instance on the claim or set off."

Rule No. 8 of the Division Court Rules of 1869, is in the same words, and the alternative judgment in form 51 is the necessary compliment to rule 8 in this respect, and in keeping with sec. 60 of the Act to which I have already referred. This rule has the same force and effect as if embodied in the Division Court Act: Consol. Stat. U. C. sec. 66.

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There can be no doubt that in reading sections 69 and 70 of the Division Court Act in connection with rule 8 and form 51, we have the equivalent of sec. 95 of the English County Court Act.

In *Isaac v. Wyld*, 7 Ex. 168, it was intimated that the most reasonable course is, that the abandonment of excess should be on the face of the summons, or particulars annexed, so that the defendant may at once acquiesce, instead of being obliged to be at the trouble and expense of attending the Court, in order to compel the plaintiff to abandon the excess.

That which in England was thus intimated to be the most reasonable course, would appear under our rule (which has the force of a statute) to be the only proper course open to a plaintiff intending to abandon an excess, so as thereby to give jurisdiction to a Division Court.

Rules of practice are not generally binding upon the Courts to the same extent as Acts of Parliament. See *Burrell v. Nicholson*, 6 Sim. 212; *Millbanke v. Stevens*, 8 Sim. 160; but see also *Smith v. Webster*, 3 My. & C. 244. But when a rule of practice has the force and effect of an Act of Parliament, it is not in the power of the Courts to disregard or relax its language any more than the language of an Act of Parliament: *Calvert v. Gandy*, 14 L. J. Ch. 141.

As the Division Courts rule provides that the excess, for the purpose of giving jurisdiction, must be abandoned in the first instance in the claim, and as there appears to be good reason for such a rule, I cannot hold that it can be properly abandoned after the claim and at the hearing. If there were no rule of the kind, an abandonment of excess might possibly be allowed at the hearing. See *Isaac v. Wyld*, 7 Ex. 163; *In re Hill*, 10 Ex. 726. See further *Bodger v. Nicholls*, 28 L. T. N. S. 441.

But this is not at all clear in a case where the claim shews an amount exceeding \$200, although the plaintiff on the face of the claim proposes to reduce it by payment or set-off: *In re Aravds et ux. and Rhodes*, 8 Ex. 312. If it appear on the face of the claim that it is one in which from the first the Court had no jurisdiction to try, the better opinion would appear to be that it cannot be brought within the jurisdiction of the superior Court by an offer at the hearing to abandon the excess: *Ib.*

Higginbotham v. Moore, 21 U. C. Q. B. 326, relied upon by the learned Judge, is no authority

to the contrary, although I admit there are expressions of opinion in the case to the contrary. In that case, it appears to me, the claim as stated disclosed claims in respect of notes which might have been sued as the cause of action, and in respect of goods sold, which might have been sued as another cause of action, without at all "dividing a cause of action" for the purpose of bringing the same within the jurisdiction of a Division Court within the meaning of sec. 59 of the Act. What the Court did in that case was to permit the plaintiff, without abandoning any excess, to restate his claim so as to shew that he was really not suing for "a balance" of an "unsettled account" exceeding \$200.

It was not therefore in any sense a case where there was anything abandoned by the plaintiff, and so is no authority for an abandonment of excess at the hearing, for the purpose of giving jurisdiction, contrary to the express terms of the rule of Court. I was counsel in the case for the prohibition, and argued that powers of amendment could not, without express authority, be allowed where there was no jurisdiction to try, but my argument did not prevail. I thought then, and still think, that the amendment in that case ought not to have been allowed. But, as the case is entirely distinguishable from the present, it is not necessary to say anything further about it.

Isaac v. Wyld, 7 Ex. 163, decides that where the original claim does not, on the face of it, shew a suit for a balance of an unsettled account exceeding £50, the excess may, in the absence of a rule to the contrary, be abandoned on the hearing.

The claim in this case did not, as first stated, shew on the face of it that the plaintiff was suing for a balance of account exceeding \$200, and were it not for the emphatic language of the rule to which I have referred, there would appear to be power in such a case to permit the abandonment of excess at the hearing for the purpose of giving jurisdiction.

I cannot however hold that an excess may be abandoned at the hearing so as to give a jurisdiction, without disregarding a rule which now has the force of an Act of Parliament. It is better that apparent injustice should be done in some particular case, than that a rule made for the governance of all cases should be designedly disregarded or openly violated by a Court of Justice. I have, therefore, come to the conclusion that the decision of the learned Judge cannot, independently of the Act of last session, be sustained.

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The question then arises, as to whether the Act of last session is applicable to suits commenced before its passing.

It seems to me that jurisdiction to try is necessary to the exercise of powers of amendment with a view to a trial. See *Hopper v. Warburton*, 7 L. T. N. S. 722.

Amendments, in order to give jurisdiction, are very exceptional, and not to be permitted, except on clear and unequivocal grounds : *In re Avards et ux. and Rhodes*, 8 Ex. 312.

Division Courts, before the passing of the Act of last session, had however a *prima facie* jurisdiction to try all claims and demands of debt, account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the account or balance claimed did not exceed \$100.

But prior to 10th February, when the Act of last session was passed, the action could not be sustained, in other words maintained, where the unsettled account in the whole exceeded \$200. Since that date the action may be maintained, in other words sustained, where the unsettled account in the whole does not exceed \$400.

The question is, whether the Act of last session affects suits commenced before it was passed, but tried on or after the day of its passing.

The rule applicable to cases of this sort, is, that where the enactment deals with rights of action, unless so expressed in the Act, an existing right of action is not taken away : *Moon v. Durden*, 2 Ex. 22; *Pettamberlass v. Thackorseydass*, 7 Moore P. C. 239; *Waugh v. Middleton*, 8 Ex. 352; *Marsh v. Higgins*, 9 C. B. 551; *Williams v. Smith*, 4 H. & N. 558; *Jackson v. Woolley*, 8 E. & B. 778; *In re Proper and Oakland*, 34 U. C. Q. B. 266. See further Maxwell on Interpretation of Statutes, 190. But where the enactment deals with procedure or something in the nature of procedure, unless the contrary is expressed, the enactment applies to all suits whether commenced before or after the commencement of the Act : *Hilleard v. Lennard*, M. & M. 297; *Towler v. Chatterton*, 6 Bing. 258; *Attorney-General v. Sillem*, 10 H. L. C. 704; *Wright v. Hale*, 6 H. & N. 227; *Kimbray v. Draper*, L. R. 3 Q. B. 160.

In *Wright v. Hall*, 6 H. & N. 227, it was held that the English statute 23 & 24 Vict. cap. 126, sec. 34, which provides that when the plaintiff in any action for an alleged wrong recovers by

the verdict of a jury less than £5, he shall not be entitled to any costs, if the Judge certifies to deprive him of them, enabled the Judge to certify in an action commenced before the passing of the Act.

In *Kimbray v. Draper*, L. R. 3 Q. B. 160, it was held that the English statute, 30 & 31 Vict. cap. 142, sec. 10, which enables a Judge to order security for costs, where the plaintiff is shewn by affidavit to have no visible means of paying costs, applies to actions commenced as well before as after the passing of the Act.

It cannot be said in this case that by holding the Act of last session applicable to suits commenced before its passing, the defendant will be deprived of any vested right.

It is not the right of a defendant to be sued in any one Court more than another. If it be in any sense his right, it is no more his right than the right of a plaintiff to recover costs or maintain his suit without giving security according to the law, as it stood when he commenced his action or suit. But all such rights, if they can be properly called rights, are subject to such legislation as may take place for the conduct of proceedings in actions and suits commenced.

In the conduct of a suit in the Division Court before 10th February, 1876, there was no power to examine into an unsettled account exceeding \$200, although the balance claimed did not exceed \$100. On and after 10th February, 1876, the power was extended to unsettled accounts not exceeding \$400, where the balance claimed is under \$100.

It appears to me that the Act of last session (cap. 15) does not deprive any one of a vested right of action, but rather makes the proceedings more effective in the case of actions commenced in Division Courts for claims under \$100.

It is true that the effect of the Act is, to widen the class of cases which may be tried in a Division Court, but while it has this effect it really deprives no man of a vested right of action within the principle of decision of *Moore v. Durden*, 2 Ex. 22, and the class of cases to which it belongs.

In *Kimpton v. Willey*, 1 L. M. & P. 294, Maule, J., is reported to have said he saw nothing to prevent the Judge of a County Court in England from enquiring into a debt of more than £20 (the then jurisdiction of County Courts in England), although if it turn out at the trial, either upon the plaintiff's case or upon the defendant's,

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that the claim is for more than £20, and that the plaintiff is splitting a demand of more than £20 into two or more demands under that amount, he is put to the option of having judgment against him, or being nonsuited or recovering £20 only and abandoning the residue.

But in *Avards et ux. v. Rhodes*, 8 Ex. 312, Pollock, C. B., speaks of these observations (if correctly reported) as at variance with the decision in *Beswick v. Capper*, 7 C. B. 669, and the words of the Act (sec. 58), that all pleas where the debt or damage claimed is not more than £20, may be helden in a County Court. The learned Chief Baron in the same case added: "The 13 & 14 Vict. cap. 61, sec. 1, passed after *Kimpton v. Willey*, 1 L. M. & P. 280, was decided, having increased the nominal jurisdiction of County Courts to £50, it cannot be that the Judge may investigate claims to *any* amount, provided his judgment does not exceed the limits of £50." The observations of Maule, J., and Pollock, C. B., shew that the learned Judges in making them, though differing in their views as to the extent of the power to be exercised by a County Court Judge in cases brought before him for trial, were dealings more with the procedure of the County Court Judge in trying cases before him than with any question of "vested right."

The Legislature has now provided that the Division Court Judge may investigate unsettled accounts—not to any amount, but to the amount of \$400, and adjudicate as to the balance, provided the balance claimed does not exceed \$100. If in the course of the investigation the Judge find an unsettled account exceeding \$400, his duty is to stop, not to go any further, not to nonsuit or award judgment of any kind, notwithstanding the suggestion to the contrary of Mr. Justice Maule in *Kimpton v. Willey*, 1 L. M. & P. 294. See *Portman v. Patterson*, 21 U. C. Q. B. 237.

I have come to the conclusion that when the trial took place here there was power to investigate the unsettled account although exceeding \$200. This being so, there was nothing to prevent the Judge making the investigation if necessary without any amendment. But the plaintiff voluntarily withdrew the first item of his account, \$30, the so-called "balance on settlement." The withdrawal of "the balance" removed all necessity for the investigation of the account of which it was said to be the balance. All that was left was the item of \$82 for board, &c., from the 4th September to the 25th November.

The Division Court unquestionably had jurisdiction in the first instance to entertain the claim as now presented of \$82. This amount is not "the balance" of any account. There is no splitting of "a cause of action" "for the purpose of bringing two or more suits" within the jurisdiction of the Division Court. There is only one suit brought. There is no more than one suit intended; and that suit, as now framed, is plainly within the jurisdiction of the Division Court, as to amount. In order to decide as to the plaintiff's right to recover that amount, no enquiry into any account prior thereto is at all necessary. When the Judge made the amendment he had, in my opinion, power to try without making an amendment. No amendment therefore was necessary to give jurisdiction. So there was not, I think, any abandonment of excess to give jurisdiction. There was jurisdiction to try independently of any question of amendment or abandonment of excess.

There were two items of claim to be tried. The first, which alleged \$30 as a balance due on a settlement of account, was at the first trial disproved. Plaintiff therefore failed to recover as to that item. It was not necessary at the same trial to strike it out in order to try the remaining item of \$82. Plaintiff in fact failed as to one of two items, and succeeded as to the other. And this without any necessity for amendment to give jurisdiction.

If the amendment had been necessary to give jurisdiction, I should have been obliged to hold that there was no power to allow the amendment at the hearing. But as under the operation of the Act of last session, there was, in my opinion, jurisdiction to try whether the amendment was made or not, the summons for prohibition on the alleged ground of want of jurisdiction must be discharged, and according to the general rule, discharged with costs.

Summons discharged with costs.

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Insolvent Act of 1875, sections 125, 158, 130, 133—Appeal—Fraudulent preference.

Appeal under section 129 of Insolvent Act of 1875, from decision of County Judge of Halton.

On the 11th September Martha Hurst and Edward Hurst her husband made a chattel mortgage to the Dominion Bank to secure a previous indebtedness of Richard Hurst to the Bank. No future day was named for the payment, and the proviso to hold possession till default was struck out. A writ of attachment in insolvency was issued against Richard Hurst on the 4th October, 1875, and the assignee took possession of the mortgaged chattels then in the debtor's possession. The Bank claimed the chattels under the mortgage, which the assignee contended was void as against the creditors. The Bank thereupon petitioned for an order directing the assignee to deliver up the goods. It appeared also that the debtor had long previously been embarrassed; that most of his paper was under protest; that his real estate was also mortgaged to the Bank and others, and no pressure was shown to obtain the inmortgage, and no promise was made of any future advance. The Judge in insolvency declined to grant the order petitioned for, holding the mortgage void under sections 130 and 133.

Held, under these circumstances, after an elaborate review of the English and Canadian authorities bearing on the subject, that the chattel mortgage was fraudulent and void as against creditors, and the appeal was dismissed, with costs.

[April 18, 1876—Harrison, C. J.]

This was an appeal under sec. 128 of the Insolvent Act of 1875, against the decision of the learned Judge of the County of Halton, in a matter of insolvency.

On 11th September, 1875, Martha Hurst and Richard Hurst, her husband, executed a chattel mortgage in favour of the Dominion Bank, on a quantity of machinery, rags, wool, and other chattels.

The mortgage was made to secure \$2267, the amount of the previous indebtedness of the mortgagor, Richard Hurst, to the bank. No future day was named for payment. The proviso for holding possession till default was struck out of the mortgage. In other respects, the mortgage was in the ordinary printed form in general use.

A writ of attachment in insolvency was issued against Richard Hurst on the 4th October, 1875, and the assignee took possession of the goods and chattels mentioned in the mortgage, which, at the time of the issue of the writ of attachment, were in the possession of the debtor. The bank claimed the goods and chattels under the mortgage. The assignee insisted that the mortgage under the circumstances was void, and that

he had a right to hold the goods and chattels mortgaged for the general benefit of creditors.

The bank thereupon petitioned the County Judge under sec. 125 of the Insolvent Act of 1875, for an order upon the assignee, D. W. Campbell, to deliver up the goods and chattels to the bank.

James Price, Jr., the manager of the Queen street agency of the Dominion Bank in Toronto, was the principal witness examined before the County Judge. From his evidence it appeared that the bank had made advances to Hurst to the amount of \$4000; that these advances were from time to time made within two or three years of the date of Hurst's insolvency, and up to within about three months previous to the date of insolvency; that all of the \$4000 was due at the time of the insolvency; that the advances were made on the discount of three months paper; that Hurst was frequently asked but without effect to reduce his indebtedness; that the mortgage was given by him after repeated solicitations, and upon a threat of legal proceedings.

It also appeared that in May, 1875, the bank took from Hurst a mortgage on his real estate, to cover his whole indebtedness; that Hurst valued his real estate at \$8000, on which he said there were previous mortgages to the amount of \$3,600; and said that the real and personal estate were the property of his wife; and that he and his wife were indebted to other parties.

It also appeared that prior to the mortgage to the bank, Hurst had given to Mr. Barber a mortgage for \$1,340, covering a portion of his machinery. The machinery at the time the mortgage was taken, was supposed to be worth \$3,400. The bank had refused to renew any of the paper two months before the mortgage was taken; all the paper excepting one note was past due at the date of the mortgage.

Mr. Price swore that it was the intention of the bank to have all the personal property of Hurst and his wife in the chattel mortgage; that he was not aware at the time the mortgage was given, that Hurst was in an insolvent state, and that he had understood from Hurst that he had plenty of assets to pay his debts.

There was no fresh advance made at the time of the execution of the mortgage. And the mortgage itself did not make any provision for, or contemplate fresh advances.

Mr. Campbell, the assignee, shewed that the claims proved against the Hurst estate amounted

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to \$2,600, exclusive of the mortgage on the real estate, and the two chattel mortgages; and that there were mortgages on the real estate, to the amount of \$4,600, exclusive of the mortgage to the bank. He estimated the personal property, exclusive of machinery, at \$3000.

The learned Judge held that the mortgage was void under the operation of secs. 130 and 133 of the Insolvent Act.

From this decision, the mortgagee appealed.

A. Campbell, for the appellants.

E. G. Patterson, for the respondent.

HARRISON, C. J.—Two questions were raised on the argument of this appeal: 1st, the right of the petitioners to the delivery of the goods and chattels mentioned in the chattel mortgage; 2nd, as to the power of the Judge to order the assignee to make delivery. If the bank has no right to the delivery, it will not be necessary to decide the question as to the power to order delivery. The right of the petitioners is denied on the reading of secs. 130 and 133 of the Insolvent Act, 1875. This Act, like the Acts of 1864 and 1869, although called an insolvent Act, is really a bankruptcy Act, and must, like the Acts of 1864 and 1869, be construed as a bankruptcy Act.

Section 130 declares that all gratuitous contracts or conveyances, or contracts without consideration, or with merely nominal consideration respecting either real or personal estate made by a debtor afterwards becoming insolvent, with or or to any person whomsoever, whether such person be his creditor or not, within three months next preceding the date of a demand of an assignment, or the issue of a writ of attachment under this Act, whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, or at any time afterwards, and “all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, whether such person be a creditor or not,” are *presumed* to be made with intent to defraud his creditors.

Section 133 declares that if any sale, deposit, pledge, or transfer, be made of any property in contemplation of insolvency by way of security

for payment to any creditor; or if any property, real or personal, movable or immovable goods, effects or valuable security, be given by way of payment by such person, to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment shall be null and void; and the subject matter thereof may be recovered back for the benefit of the estate by the assignee in any Court of competent jurisdiction; and if the same be made within thirty days next before demand of an assignment, or for the issue of a writ of attachment under this Act, or any time time afterwards whenever such demand shall have been followed by an assignment or by the issue of such writ of attachment, it shall be *presumed* to have been so made in contemplation of insolvency.

The presumption of fraud in sec. 130, and the presumption of fraudulent preference in sec. 133 are, according to the decided cases, both rebuttable presumptions of fact: see *The Bank of Australasia v. Harris*, 15 Moore P. C. 197; *Nunes v. Carter*, 36 L. J. P. C. 124, 4 Moore P. C. N. S. 222; *Newton v. The Ontario Bank*, 13 Grant 659; *Campbell v. Barrie*, 31 U. C. Q. B. 279.

The doctrine of “fraudulent preference” described by Lord Ellenborough as “an excrescence on the bankrupt laws:” *Crosby v. Crouch*, 2 Camp. 168, is entirely of judicial creation, and is generally considered to have been introduced by Lord Mansfield: *Alderson v. Temple*, 4 Burr. 2235, 1 W. Bl. 660; *Harman v. Fishar*, Cowp. 117; *Rust v. Henry*, Cowp. 629; *Martin v. Pewtress*, 4 Burr. 2478; but has now, both in England and here, received legislative recognition.

The object of the law against fraudulent preferences is to prevent a trader on the eve of bankruptcy from making a voluntary distribution of his property amongst his creditors so as to defeat that equal distribution which is contemplated by the bankrupt laws: Robson’s Bankruptcy, 112, 113.

The learned Chancellor, in *Payne v. Hendry*, 20 Grant 144, appears to think that the preference provision contained in our act should, on the supposed authority of *Adams v. McCall*, 25 U. C. Q. B. 219, receive a broader interpretation than any corresponding provision contained in the English Bankrupt Acts, and for that reason appears to doubt the more recent decisions of *McWhirter v. Thorne*, 19 C. P. 302; *Campbell*

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v. Barrie, 31 U. C. Q. B. 279; and Archibald v. Haldan, 31 U. C. Q. B. 295.

The reasoning of the Chancellor is not only opposed to the cases mentioned, but also to the opinion of Lord Kingsdown in *The Bank of Australasia v. Harris*, 6 L. T. N. S. 115, 15 Moore P. C. 197; and to *McFarlane v. McDonald*, 21 Grant 319; and is not such that I am, in the absence of a decision on the point by the Court of Appeal, prepared to follow.

I may however remark that as the Chancellor in *Payne v. Hendry*, found that the debtor was insolvent when he executed the mortgage: that the defendant at the time he received the mortgage was aware of the debtor's insolvency; and that his becoming insolvent was then in contemplation of both parties, he found all the elements necessary to constitute "a fraudulent preference" within the meaning of the doctrine enunciated by the English decisions; and in this view his remarks as to *McWhirter v. Thorne*, *Campbell v. Barrie*, and *Archibald v. Haldan*, may be looked upon as *obiter dicta*.

If it were otherwise I would prefer, sitting as I am in appeal, to follow *McWhirter v. Thorne*, 19 C. P. 302, *Campbell v. Barrie*, 31 U. C. Q. B. 279, and *Archibald v. Haldan*, 31 U. C. Q. B. 295, being the most recent decisions of Courts of concurrent jurisdiction with the Court of Chancery, and decisions which give us the benefit of the English bankruptcy cases, the accumulated wisdom of centuries, rather than, in a doubtful case, in a new country, in a matter affecting trade, strike out a new course which may lead us we know not where.

It seems to me, therefore, that a preference to be void under sec. 133 of our Act must not only be "in contemplation of insolvency," but proved to be made under such circumstances as to be deemed fraudulent: *In re Colemere*, L. R. 1 Ch. Ap. 128.

Then what is the meaning of the words "in contemplation of insolvency?" The learned Chancellor Sprague in *Newton v. The Ontario Bank*, 13 Grant 659, in answer to the question, says "I take the meaning to be that the sale, deposit, or other act, is an act taken in order to save the subject thereof from creditors into whose hands it must otherwise fall."

The words "in contemplation of insolvency" used in our Act should receive as nearly as possible the same construction as the words "in

contemplation of bankruptcy" used in the English Bankruptcy Acts: *Tuer v. Harrison*, 14 C. P. 449; *Newton v. The Ontario Bank*, 13 Grant 662.

There has been in England considerable differences of opinion as to the correct meaning to be given to the words "in contemplation of bankruptcy:" that is to say, whether they require the existence of an actual intention or determination on the part of the debtor to become a bankrupt: or, whether it is sufficient to satisfy them if the circumstances of the debtor at the time of the transaction are such as to make his bankruptcy, according to some authorities, a probable, and according to others, an inevitable event: Robson, 129, 130.

The case of *Morgan v. Brundrett*, 5 B. & Ad. 296, is the leading authority in support of the view that actual bankruptcy must be contemplated at the time of the transaction, and the same doctrine was held in *Atkinson v. Brindall*, 2 Bing. N. C. 225; *Abbott v. Burbage*, 2 Scott 656; *Gibson v. Boutts*, 3 Scott 229; *Green et al. v. Bradfield*, 1 C. & K. 449; *Hunt v. Mortimer*, 10 B. & C. 41; *Strachan v. Barton*, 11 Ex. 647; *Ex parte Matthews*, 25 L. T. N. S. 276; *Ex parte Bolland*, L. R. 7 Ch. 24.

The authorities in support of the other construction of the words are *Gibson v. Boutts*, 4 M. & G. 169; *Gibson v. Musheatt*, 4 M. & G. 160; *Hartshorn v. Sladden*, 2 B. & P. 32; *Flock v. Jones*, 4 Bing. 20, 25; *Poland v. Glyn*, 4 Bing. 22; *Gibbins v. Phillipps*, 7 B. & C. 529, 534; *Ex parte Simpson*, DeG. 9; *Ex parte Majoribanks*, DeG. 466; *Aldred v. Constable*, 4 Q. B. 676; See also *Marshall v. Lamb*, 5 Q. B. 115; *Belcher v. Prettie*, 10 Bing. 408; *Groom v. Watts*, 4 Ex. 727; *Marsh v. Sweeny et al.*, 2 Pugs. N. B. 454; *Curtis v. Jacobs*, 17 L. T. N. S. 574; *Ex parte Wreford*, 24 L. T. N. S. 638; *Alton v. Harrison*, L. R. 4 Ch. Ap. 622.

The doctrine laid down in *Morgan v. Brundrett* seems to have gone too far in holding the *actual contemplation of bankruptcy* by the debtor necessary to constitute a fraudulent preference, and the correct interpretation of the words in question would seem to be that which was adopted by Tindal, C. J., in *Gibson v. Boutts*, namely, "that although there may not be in the actual mind of the debtor at the time of the transaction any actual contemplation of bankruptcy, or intention to become a bankrupt, yet, if he is at the time in such a hopeless state of insolvency that he cannot reasonably hope to avoid bank-

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ruptey, a preference voluntarily made by him will be considered as made in contemplation of bankruptcy, and a fraudulent preference :" Robson 129, 130.

In *Smith v. Cannan*, 2 E. & B. 35, Jervis, C.J., said, "I am inclined to think that inasmuch as such a conveyance must have the effect of defeating or delaying creditors, and every man must be taken to intend the necessary consequences of his own acts, the party who executed it must be presumed to have had the intent, and therefore there was no question for the jury."

These observations, though not fully approved by Robson on Bankruptcy, at p. 113, of his most useful work, are with others quoted with approbation by the Chancellor in *Payne v. Hendry*, 20 Grant, 145.

It would, however, be an idle and a fruitless task to attempt to reconcile the English or our own bankruptcy decisions.

Where the enquiry is as to a matter of fact, Judges, like jurors, will be found widely differing in the conclusions which they draw from facts.

At one time the tendency of the Courts was in favour of the assignees of a bankrupt, and of swelling as much as possible the assets for distribution among the general body of creditors. Great endeavour was made by Park, B., to stem this tide : *Mogg v. Baker*, 4 M. & W. 348, and *VanCasteel v. Booker*, 2 Ex. 691, are instances of this endeavour ; and in *Brown v. Kempton*, 19 L. J. N. S. 169, the question as to what constituted a voluntary payment was again discussed, and a rule laid down in accordance with *Edwards v. Glynn*, 2 E. & E. 22. In the same case, Crompton, J., said, "I have known the tide, to use my brother Erle's expression, turn more than once as regards the rights of assignees and creditors. What I wish is, to keep as much as possible to the decisions establishing the principle set up at the last turn of the tide."

In *Brown v. Kempton*, which was an action by assignees to recover back from a creditor of the bankrupt, the amount of a debt paid to him by the bankrupt, and which the assignee alleged to have been made by way of fraudulent preference, the Judge directed the jury, (1) that if the bankrupts were induced to make the payment by pressure of the creditor, the verdict should be for the creditor ; (2) that if the bankrupts were not influenced by pressure, but acted voluntarily and with a view to give a preference to the creditor in the event of bankruptcy, the verdict should be against the creditor ; and that if

the payment was made under the influence of the pressure of the creditor, and also with a desire to give a preference to the creditor in the event of bankruptcy, the verdict should be for the creditor, and the direction was sustained as being a correct exposition of the law.

The word "preference," in itself, implies an act of the free will. Doing an act under pressure is inconsistent with the idea of doing it in the exercise of a free will : *Johnstone v. Fesemeyer*, 25 Beav. 93, 3 DeG. & J. 13.

The doctrine of pressure has ever in England been considered as having a very important bearing on the decision of the question of fact, whether a particular security or particular payment not being the whole of the debtor's effects, was a fraudulent preference and void against creditors : *Rust v. Henry*, Cowp. 629 ; *Hartshorn v. Sladden*, 2 B. & P. 58 ; *Smyth v. Payne*, 6 T. R. 152 ; *De Tastet v. Carroll*, 1 Stark. 88 ; *Crosby v. Crouch*, 2 Camp. 166 ; *Morgan v. Brundrett*, 5 B. & Ad. 289 ; *Fidgeon v. Sharpe*, 5 Taunt. 539 ; *Green v. Bradfield*, 1 C. & K. 449 ; *Cook v. Pritchard*, 6 Scott N. R. 34 ; *Wainwright v. Clement*, 4 M. & W. 385 ; *Pennell v. Heading*, 2 F. & F. 744 ; *Kinnear et al. v. Johnson*, Ib. 753 ; *Graham et al. v. Candy*, 3 F. & F. 206 ; *Ex parte Seals*, 10 L. T. N. S. 315 ; *Smith et al. v. Timms*, 1 H. & C. 849 ; *Bills et al. v. Smith*, 34 L. J. Q. B. 68 ; *Marks v. Feldman*, L. R. 5 Q. B. 275, 283 ; *Gas Light Improvement Co. v. Terrell*, L. R. 10 Eq. 18.

And the same doctrine, by all the Courts of this Province, has been hitherto considered to have a similar bearing in construing the provisions of our Insolvency Acts of 1864 and 1869, as to preferences : *Bank of Toronto v. McDougall*, 15 C. P. 475 ; *Clemmow v. Converse*, 16 Grant 547 ; *McWhirter v. Thorne*, 19 C. P. 302 ; *Hersee v. White*, 29 U. C. Q. B. 232 ; *Mc Whirter v. Royal Canadian Bank*, 17 Grant 480 ; *Allan v. Clarkson*, 17 Grant 570 ; *Roe v. Smith*, 15 Grant 344 ; *Campbell v. Barrie*, 31 U. C. Q. B. 279 ; *Archibald v. Haldan*, 31 U. C. Q. B. 295.

The doctrine of pressure as applied to the Insolvent Act by the Courts of this Province, if deemed unsound, can only be got rid of by a decision of the Court of Appeal, or Act of the Legislature.

Prima facie a trader who, on the eve of bankruptcy, hands over to a creditor assets which ought to be ratably distributed among all his creditors, must be taken to have acted in fraud of the law, but if circumstances exist which tend to explain and give a different character to

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the transaction, and to shew that the debtor acted from a different motive, these circumstances must be left to a jury, who should be told that unless they come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest, the transaction will stand good in law: *per Cockburn, C. J.*, in *Bills et al. v. Smith*, 6 B. & S. 324.

There is no doubt that in the great majority of cases, the question of fraudulent preference would be determined by the fact of the payment having been made spontaneously by the debtor without pressure on the part of the creditor. Unexplained, a payment so made would carry with it the presumption that the intention of the debtor was to act in fraud of the bankrupt law. Hence the importance of requiring fraud or pressure on the part of the creditor in order to rebut the inference which would otherwise arise from the apparent spontaneousness of the act, and hence the language of the Judges in the cases referred to, in distinguishing between a voluntary payment and one made on the pressure of the creditor: *Ib.*, p. 318.

But it by no means follows that, because in the majority of cases the absence of pressure by the creditor may properly lead to the inference that the debtor intended to act in fraud of the law, that circumstance must necessarily be conclusive in a case where other circumstances are found sufficient to rebut the presumption of fraudulent intention, for it must be borne in mind that the true question in all these cases is, whether the intention with which the payment was made was to defeat the operation of the bankrupt law. It is this intention to act in fraud of the law, which stamps the preference of the particular creditor, however morally honest, with the character of fraud: *Ib.*

In order to constitute "pressure," it is not necessary that legal proceedings should have been resorted to, for if the pressure was such that it overweighed the bankrupt's own inclination and induced him to act against his will, that is sufficient pressure within the meaning of the bankrupt laws: *De Tastet v. Carroll*, 1 Stark. 88; *Thompson v. Freeman*, 1 T. R. 155; *Cosser v. Gough*, *Ib.*, 156; *Ex parte Scudamore*, 3 Ves. 65; *Ex parte Ainsworth*, 3 M. & A. 451; *Belcher v. Prettie*, 10 Bing. 408; *Johnson v. Fesemeyer*, 3 DeG. 13; *Strachan v. Barton*, 11 Ex. 650; *Vacher v. Cocks*, 1 B. & Ad. 152; *Mogg v. Baker*, 4 M. & W. 348; *Van Casteel v. Booker*, 2 Ex. 691.

It is impossible to declare the minimum of language or conduct on the part of a creditor which will be strong enough to remove the volition of the debtor: *per Wilson, J.*, in *Campbell v. Barrie*, 31 U. C. Q. B. 293; see *Clemmow v. Converse*, 16 Grant, 547.

A distinction has been made in some modern cases as to the effect of pressure or importunity on the part of the creditor, where notwithstanding such pressure or importunity, the bankrupt appears, or is suspected to have been influenced by a desire to prefer the creditor, or at least not to have acted in consequence of such pressure or importunity, so much as from a desire to favour the creditor.

In some of these cases it has been held that the pressure or importunity of the creditor will not prevent the act from being a fraudulent preference: *Cook v. Rogers*, 7 Bing. 438; *Abbott v. Pomfret*, 1 Bing. N. C. 62; *Marshall v. Lamb*, 5 Q. B. 115; *Cook v. Pritchard*, 5 M. & G. 329; *Van Casteel v. Booker*, 2 Ex. 691.

This doctrine, however, according to Robson, p. 114, seems to be founded on a principle of a speculative and unsafe character, and is calculated to work injustice to a creditor by depriving him of the fruits of his diligence, and it may be considered to have been very much qualified if not entirely overruled by some subsequent cases: *Brown v. Kempston*, 19 L. J. C. P. 165; *Edwards v. Glyn*, 2 El. & El. 20. See also *Smith v. Timms*, 1 H. & C. 849; *Morgan v. Brundrett*, 5 B. & Ad. 296; *Pennell v. Heading*, 2 F. & F. 744; *Graham v. Candy*, 3 Ib. 206; *Kinnear v. Johnson*, 2 F. & F. 753; *Davidson v. Robinson*, 3 Jur. N. S. 791; *Bills v. Smith*, 34 L. J. Q. B. 68, from which the true principle would seem to be that if there is a *bona fide* application or pressure on the part of some person having a right to apply, and the act in any degree proceeds from such application or pressure it is not entirely voluntarily, and therefore not, except where the whole stock is assigned, an act of bankruptcy: Robson 114.

The English Bankruptcy Act of 1869, sec. 92, as to fraudulent preferences declares that the section "shall not affect the rights of a purchaser, payer, or incumbrancer in good faith for valuable consideration": see *Butcher v. Stead*, L. R. 7 H. L. C. 839.

The evidence of pressure in this case was uncontradicted. I think it shewed that the act of the debtor in giving the mortgage was not altogether voluntary, and if there were nothing

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more in the case I would feel compelled, on the authority of the decided cases, to reverse the decision of the learned Judge.

But if that decision can be sustained on any ground, it ought not to be reversed. And there is a ground on which it may be and ought to be sustained, and that without in any manner impeaching *McWhirter v. Thorne*, 19 C. P. 302; *Campbell v. Barrie*, 31 U. C. R. 279 or *Payne v. Hendry*, 20 Grant 142.

The English authorities (as said by Mowat, V. C., in *McWhirter v. Royal Canadian Bank*, 17 Grant 481), in regard to mortgages by a bankrupt to secure an antecedent debt between such mortgages, when given by the debtor voluntarily or spontaneously in contemplation of his bankruptcy and when given upon pressure of some kind on the part of the creditor. Mortgages of the former class are wholly void against the assignee in bankruptcy. Mortgages of the latter class, that is mortgages obtained by pressure, are valid or invalid according to circumstances. Such a mortgage is not valid if it cover the whole of the debtor's assets, or if it cover so much or such part as necessarily stops the mortgagors' trade, or prevents its being carried on in its usual and ordinary course, or enables the mortgagor forthwith to put a stop to the business.

It has always been held competent for a trader to appropriate specific portions of his property in payment of, or by way of security for, particular debts: *Worsley v. De Mattos*, 1 Burr. 278; *Wilson v. Day*, 2 Burr. 827; *Hooper v. Smith*, 1 W. Bl. 442; *Compton v. Bedford*, 1 W. Bl. 362; *Law v. Skinner*, 2 W. Bl. 996. Indeed, unless this were allowed commerce could not be carried on: Robson, 111.

The true principle applicable to cases of this kind with respect to traders appears to be that if the transaction is *bona fide*, and does not involve consequences injurious to the trader's solvency, it will not be an act of bankruptcy, and so not void as against the assignee in bankruptcy: *Dangerfield v. Thomas*, 9 A. & E. 292; *Hunt v. Mortimer*, 10 B. & C. 44; *Crowfoot v. Gurney*, 9 Bing. 372; *Belcher v. Oldfield*, 6 Bing. N. C. 102; *Hutchinson v. Heyworth*, 9 Ad. & E. 375; *Walker v. Norton*, 9 M. & W. 411; *Smith v. Timms*, 1 H. & C. 849; *Ex parte McKenzie*, 42 L. J. Ch. 25; *Ex parte Izard*, L. R. 9 Ch. 271.

But if the circumstances of the trader and the nature of the security are such, pressure or no pressure, that the necessary result of the security, if carried into effect, would be to disable the trader from carrying on his business, the se-

curity will be held void as against the assignee in bankruptcy: *Worsley v. De Mattos*, 1 Burr. 478; *Hooper v. Smith*, 1 W. Bl. 442; *Lindon v. Sharp*, 6 M. & G. 895; *Bittlestone v. Cook*, 6 E. & Bl. 296; *Ex parte Bailey*, 3 DeG. M. & G. 534; *Hale v. Allnutt*, 18 C. B. 505; *Stanger v. Wilkins*, 19 Beav. 626; *Turner v. Harlecastle*, 11 C. B. N. S. 683; *Ex parte Bland*, 6 DeG. M. & G. 757; *Johnson v. Fesemeyer*, 3 DeG. & J. 13; *Stanger v. Wilkins*, 1 DeG. J. & S. 280; *Ex parte Wensley*, 1 De G. J. & S. 273; *Goodricke v. Taylor*, 2 DeG. J. & S. 135; *Ex parte Foxley*, L. R. 3 Ch. Ap. 515; *Woodhouse v. Murray*, L. R. 2 Q. B. 634; *Ex parte Fisher*, L. R. 7 Ch. Ap. 636; *Thorne v. Torrance*, 16 C. P. 445, S. C. in Appeal, 18 C. P. 29; *Ex parte Reader, In re Wrigley*, L. R. 20 Eq. 763; *Ex parte Trevor, In re Burghardt*, L. R. 1 Ch. D. 297.

It has been long settled that an assignment by a trader of all, or substantially all, of his property to secure a pre-existing debt is fraudulent and void as against the assignee in the event of bankruptcy: *Whitwell v. Thompson*, 1 Esp. 72; *Tappenden v. Burgess*, 4 East 230; *Newton v. Chandler*, 7 East 133; *Worsley v. De Mattos*, 1 Burr. 468; *Butcher v. East*, Doug. 295; *Ex parte Bourne*, 16 Ves. 149; *Ex parte Smith*, 1 Ves. N. S. 518; *Lindon v. Sharp*, 6 M. & G. 895; *Stewart v. Moody*, 1 C. M. & R. 777; *Botcherby v. Lancaster*, 1 A. & E. 77; *Sibert v. Spooner*, 1 M. & W. 714; *Graham v. Chapman*, 12 C. B. 85; *Hutton v. Crutwell*, 1 E. & B. 15; *Ex parte Wensley*, 1 DeG. J. & S. 273; *Payne v. Hornby*, 25 Beav. 280; *Smith v. Timms*, 1 H. & C. 849.

In these cases the debtor gains nothing by the transaction to assist him in carrying on his business, and he places himself and the whole of his estate, or substantially the whole of his estate, at the mercy of a particular creditor, whilst his other creditors are obstructed in their legal remedies: Robson, 108.

One recognized exception to the rule is, where the consideration for the security is in substantial part a fresh advance, or there is a *bona fide* promise or understanding to supply fresh advances: *Whitwell v. Thompson*, 1 Esp. 72; *Hutton v. Crutwell*, 1 E. & B. 15; *Bittlestone v. Cook*, 6 Ib. 296; *Bell v. Fairbanks*, 2 H. & N. 410; *Pennell et al. v. Reynolds*, 11 C. B. N. S. 709; *Mercer v. Peterson*, L. R. 2 Ex. 304, L. R. 3 Ex. 104; *Ex parte Foxley*, L. R. 3 Ch. Ap. 515; *Woodhouse v. Murray*, L. R. 2 Q. B. 634; *Mathers v. Lynch*, 28 U. C. Q. B. 354; *Campbell v. Barrie*, 31 U. C. Q. B. 279; *In re*

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Winstanley, L. R. 1 Ch. D., 290; *R. C. Bank v. Kerr*, 17 Grant 59; *McWhirter v. R. C. Bank*, Ib. 480.

Another recognized exception is, where the security is given in pursuance of an agreement entered into at the time the money was lent: *Harris v. Rickett*, 4 H. & N. 1; *Mercer v. Peterson*, L. R. 2 Ex 304; *Woodhouse v. Murray*, L. R. 2 Q. B. 634; *Re Craven and Marshall*, L. R. 10 Eq. 648, 6 Ch. 70: *Ex parte Topham*, L. R. 8 Ch. 614; *Ex parte Bolland*, L. R. 7 Ch. 24; *McFarland v. McDonald*, 21 Grant 319; *Ex parte Hodgkin, In re Softley*, L. R. 20 Eq. 746.

In *Archibald v. Haldan*, 31 U. C. Q. B. 298, the mortgage was given more than three months before the attachment issued. The plaintiff was not aware at the time that the mortgagor was insolvent, and there were no facts proved from which that inference could necessarily be drawn, and it was found as a fact that the mortgage was not made with intent to defeat or delay creditors. On these special grounds, *Archibald v. Haldan* may be sustained, without accepting it as an authority that the English decisions, as to the effect of a transfer by a trader of the whole of his property as security for a pre-existing debt, are inapplicable under our Act.

In judging of the validity of transactions of this kind, it is important to consider the previous dealings between the parties—the dealings at the time the security is given; the description of the property comprised in the security deed; its relative proportion to the debtor's other property; the state of his other property, whether incumbered or not, and the general state of his pecuniary affairs, together with the provision for payment, and the presence or absence of provision for future advances: Robson, 111.

The debtor in this case was at the time of giving the mortgage carrying on the business of a miller. He had long previously been so embarrassed in his business that most of his paper was under protest in the bank. His real estate was under mortgage to the bank and to others. His chattels were under mortgage to others. There was no promise at the time the money was advanced to give the mortgage. The bank took the mortgage on mill property necessary to carrying on the business. There was no future day for payment named in the mortgage. There was no present advance. There was no promise of any future advance. The mortgage, without being any benefit whatever to the trader's estate,

was an absolute block in the way of his creditors. Within thirty days thereafter, a writ of attachment in insolvency issued against the mortgagor.

On these facts, it is impossible consistently with the majority of the English bankruptcy decisions, and of our own decisions, to sustain the mortgage as against the assignee in insolvency. See especially the recent decisions of Chief Judge Bacon, in *Ex parte Trevor, In re Burghardt*, L. R. 1 Ch. D. 297, reversing the decision of the County Court Judge.

To do so, would be practically to repeal the restrictions as to preferences contained in the Insolvent Act, and enable a debtor within thirty days of his insolvency, to dispose of his estate in contemplation of insolvency for the benefit of a particular creditor, to the detriment of the rest, contrary to the whole scope and intention of the Insolvent Act, and of all such Acts,

It may be, as said by Mr. Justice Wilson, in *Campbell v. Barrie*, 31 U. C. Q. B. 287, and as apparently held in *Archibald v. Haldan*, 31 U. C. Q. B. 295, that the transfer of the whole of the debtor's property, or substantially the whole of it, for an antecedent debt is not necessarily an act of bankruptcy, and that it is so or not according to circumstances. But where the circumstances are as here, where the effect of the transfer given, as it was *within* thirty days of the issue of the writ of attachment, is so plainly to defeat creditors—where there is really nothing pretended as to any antecedent agreement to give the security when the money was lent; where there is no pretence of a present advance or promise of future advances; where there is no future day fixed for payment, and no right to hold possession till default; where the mortgagees from their position as the bankers of the mortgagor either knew or must have known of the debtor's embarrassments; where at the time they hold a large amount of his paper under protest—there can be but one conclusion drawn from the facts consistently with the whole current of authorities, and that conclusion is against the validity of the transfer.

This is the conclusion at which the learned Judge of the County Court arrived, after a careful review of the facts and careful examination of the leading authorities bearing upon the facts. I cannot, sitting as an appellate Judge, in such a case, disturb this conclusion.

This appeal must be dismissed with costs.

Appeal dismissed with costs.

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IN THE MATTER OF JOHN DIXON AND THOMAS SNARR.

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IN THE MATTER OF JOHN DIXON, PLAINTIFF,
AND THOMAS SNARR, AND OTHERS, EXECUTORS
OF JOHN SNARR, DECEASED, DEFENDANTS.

County Court Jurisdiction—Reduction by payment or set-off—Statement of accounts—Enquiry as to facts before prohibition granted.

The Judge of a County Court has the right at the trial of a case where the jurisdiction of the Court is denied, to enquire into the facts, so as to ascertain whether or not there be jurisdiction: *ex. gr.* to enquire whether there has been a settlement of accounts between the parties. Until such enquiry has been made, prohibition cannot be granted.

[April 21, 1876.—*Harrison, C. J.*]

This was a summons calling on George Duggan, Esquire, the Judge of the County Court of the County of York, and on one John Dixon, or his attorney or agent, to shew cause why a writ of prohibition should not issue to prohibit the said Judge from further proceeding in a cause in the said County Court, wherein the said John Dixon was plaintiff, and Thomas Snarr and others defendants, and why the said plaintiff should not pay the costs of the application.

Mr. Lee (Bigelow & Hagle) shewed cause.

The writ of summons was issued in the County Court, on 3rd March, 1876.

The following were the particulars of the plaintiff's claim, as endorsed on the writ:—

1875.	
Jan. 28.—To amount of acc. rendered,	\$611 90
Cr. By amount contra acc.,	561 97
	\$49 93

The writ was served on 6th March, 1876.

The defendants having entered an appearance, the plaintiffs declared on the common counts.

Particulars of the plaintiff's claim were demanded and served. The particulars contained many items for work done from time to time, between 1st February, 1873, and 28th January, 1876, by the plaintiff as a carriage builder, for John Snarr, deceased, in the aggregate amounting to \$611 90

Cr. 1874.

Sept. 3.—By old buggy, \$50 00

1875.

Jan. 12.—Contra acc. to date, 511 97

— 561 97

Balance claimed, \$49 93

tlement of accounts between the plaintiff and John Snarr, and there never was any agreement to allow the contra account, but on the contrary both accounts have always been open and unsettled.

On 27th March last, the attorneys for defendant addressed a letter to the attorneys for the plaintiff, disputing the jurisdiction of the County Court to try the cause, and on the following day received a letter from the attorneys for the plaintiff, in which the latter maintained that the action was properly brought in the County Court, and announced their intention of proceeding therein.

The plaintiff made affidavit in answer to the summons, to the effect that the defendants were justly and truly indebted to him in the sum of \$26.53, which amount is the balance of an account against them after giving credit for \$585.37, being the value of coal and an old buggy taken on account: that the statement in the affidavit of William Snarr, as to there being no settlement of accounts at any time between the plaintiff and John Snarr, deceased, is incorrect, "our accounts were mutually rendered at stated intervals; that, at each of such times of rendering said accounts, defendant caused John Snarr's account to be placed to his credit, and in subsequent statements of accounts sent to John Snarr such credits were allowed, and he had without objection been allowed the total amount of his account as rendered by a credit to the account against him; that on or about February, 1873, it was mutually agreed and understood between John Snarr and deponent, that deponent should take coal from John Snarr on account of plaintiff's account against him; that from that time deponent continued at intervals, as he happened to be in need of it, to take quantities of coal on account of the said John Snarr's indebtedness to him, and gave him credit for the same.

Osler supported the summons, citing *In re Furnival v. Saunders*, 26 U. C. Q. B. 119, and *Fleming v. Livingstone*, 6 Prac. R. 63.

HARRISON, C. J.—The County Courts of the Province of Ontario are, like the Division Courts of the Province, limited as to the amount of their jurisdiction.

Subject to certain exceptions, enumerated in Consol. Stat., U. C. cap. 15, County Courts have jurisdiction.

1. In all personal actions where the debt or damages claimed do not exceed the sum of \$200.

The defendant William Snarr, on the summons being obtained, filed an affidavit in which it was sworn that there never had been any set-

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2. In all causes or suits relating to debt, covenant and contract, to \$400, where the amount is liquidated or ascertained by the act of the parties or signature of the defendant.

It is to be observed that in the County Courts Act there is nothing, as in the Division Courts Act, Consol. Stat., U. C. cap. 19, sec. 59, to prevent the Judge examining into an unsettled account to any amount, provided the claim and recovery be not for more than \$200 : see *McKenzie v. Ryan*, *ante infra*, p. 323.

The Judge sitting in a Division Court has now, under the Act of last session of the Ontario Legislature, cap. 15, power to examine into an unsettled account up to \$400.

So long as there is no statutory provision to the contrary it would seem that there is nothing to prevent the Judge sitting in a County Court, where the balance claimed and recoverable does not exceed \$200, examining, for the purpose of ascertaining the balance, into the items of the unsettled account exceeding in the whole \$400 : *Clark v. Askew*, 8 East 28; *Horne v. Hughes*, 8 East 347; *Harsout v. Larken*, 3 B. & B. 257; and *per Maule*, J., in *Kimpton v. Willey*, 1 L. M. & P. 294. But see also *McCollum v. Carr*, 1 B. & P. 223; *Turner v. Berry*, 5 Ex. 858; *Mearns v. Gilbertson*, 6 O. S. 573; and *per Pollock*, C. B., in *Awards v. Rhodes*, 8 Ex. 317.

If, as against the whole account proved, there be proof of payments, credit must be given for the payment and the amount of the account be correspondingly reduced : *Walker v. Watson*, 8 Bing. 414.

In *Mearns v. Gilbertson*, 6 O. S. 573, a distinction was drawn between payments made generally on account and payments specifically applied to particular claims, but this distinction has not since been upheld : *McMurtry v. Munro*, 14 U. C. Q. B. 166.

The amount due to the plaintiff must be, and can only be, the amount remaining after deduction of all payments, whether made as to specific claims of the account or generally on account : *Turner v. Berry*, 5 Ex. 858; *Brown v. McAdam*, 4 Prac. R. 54.

Whether it be true that payments be made as stated is a question of evidence, and if it turn out that they were not made, and plaintiff seek to recover more than the amount the jurisdiction of the Court can award, he would have no right to proceed in the action : per *Burns*, J., in *McMurtry v. Munro*, 14 U. C. Q. B. 170.

There is a difference between payment and set-off. A set-off is in the nature of a cross-action. A man having a cause of action against another cannot be compelled against his will to set off this claim or accept credit for it against another cause of action : *per Park*, B., in *Turner v. Berry*, 5 Ex. 860. If the parties wish to agree before action brought that certain demands due by the one side should be set off against the other, the set-off would become a payment : *per Alderson*, B., *Ib.*

Where the reduction is attempted by set-off, and there is no agreement that the set-off must be deducted, and no balance ascertained between the parties, and the whole amount of the plaintiff's account exceed \$200, the suit should in such a case be instituted in one of the superior Courts of Law : *Fitzpatrick v. Pickering*, 2 Wils. 69; *Cross v. Fisher*, 3 Wils. 48; *Cook v. Johnson*, 2 Price 19; *Woodhams v. Newman*, 7 C. B. 654; 1 L. M. & P. 683; *Beswick v. Capper*, 7 C. B. 669: *In Re Furnival v. Saunders*, 26 U. C. Q. B. 119.

The County Court has no jurisdiction, under colour of adjudicating upon a small debt, in effect, to decide two separate actions in each of which the amount unsettled and in dispute exceeds the amount to which the jurisdiction of the Court is limited : see *per Wilde*, C. J., in *Woodhams v. Newman*, 1 L. M. & P. 685; and *per Coltman*, J., *Ib.* 688.

If the amount of the plaintiff's account exceed the jurisdiction of the Court as to amount, and it do not appear that the amount was reduced by payment or by set-off, which was agreed between the parties should be taken as payment, the action is beyond the jurisdiction of the County Court : *per Morrison*, J., in *Furnival v. Saunders*, 26 U. C. Q. B. 122.

But the Court has jurisdiction at the trial to enquire into the fact whether it was agreed between the parties that the set-off should be taken as payment, or whether there was any statement of account between the parties, and according to the result of the enquiry, there would or would not be jurisdiction to entertain the cause : see cases cited in *McKenzie v. Ryan*, *ante infra*.

The plaintiff swears that when the account was opened between the plaintiff and the deceased, it was mutually agreed and understood between the parties that plaintiff should take coal on account of the plaintiff's account, and that from time to time the plain-

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tiff continued at intervals to take quantities of coal on account, gave credit to the deceased for the same, and in subsequent statements of account sent to deceased, such credits were allowed, and that the deceased had without objection been allowed the total amount of his account rendered, as a credit to the account against him.

If the County Judge find this to be, on proper evidence, a correct statement of what took place between plaintiff and deceased, there is clearly jurisdiction as much as if the reductions had been from time to time made in actual money.

Prohibition cannot be granted, unless it appear that in no view of the facts has the County Court jurisdiction: *Fleming v. Livingstone*, 6 Prac. R. 63; and other cases cited in *McKenzie v. Ryan, ante infra*.

Here the material facts necessary to the determination of the question of jurisdiction are in dispute. The plaintiff presents a view of the facts, which, if on proper evidence at the trial is found to be correct, clearly gives the Court jurisdiction. The defendant William Snarr, so far as he has any knowledge, swears to a contrary view of the facts.

If the learned Judge at the trial, should on the evidence find in favour of the defendant's contention, there would still, I think, be nothing to prevent the plaintiff, if so disposed, accepting a verdict for \$200 in settlement of his account for \$611.90; but it would then be in the power of defendants to sue plaintiff for the amount of their account, \$585.37, and plaintiff, in that event, would be unable to make any set-off beyond the amount recovered in the County Court.

Until the Judge of the County Court has heard the evidence, and decided as to the facts involving the question of jurisdiction, prohibition cannot be granted.

The summons must be discharged with costs.

Summons discharged with costs.

SCHNEIDER V. AGNEW ET AL.

Con. Stat. U. C. ch. 24, ch. 41—Examination of debtor—Refusal to answer—Unsatisfactory answers—Commitment.

The judgment was against a husband and his wife. They were examined as to their estate and effects under the above statute. It appeared from the wife's statement that she had at one time mortgages, which, if still held by her, would have been applicable to the satisfaction of the judgment. She had not now the means of satisfying the judgment, the reason of her inability being that she gave to her husband the mortgages and proceeds of mortgages which she owned to enable him, as she said, to enter into business, or for some other purpose. The husband refused to answer the question as to who bought the mortgages, or whether he negotiated the sale of the mortgages. He admitted that he lately had money in his possession to a considerable amount: may have had over \$1,000, but could not tell if he had \$2,000, or how much he had; could not say when he got the money. He gave some of the money, he could not say how much, to another person, but kept no account of it; the rest of it he could give no information about.

Held, that the husband had not made satisfactory answers respecting property which was liable, as his property, to satisfy the judgment. An order was accordingly made to commit him to the common gaol of the county for three months.

The law on this subject fully discussed, and the authorities fully reviewed.

[May 2, 1876—*Harrison, C. J.*]

Osler, on the 31st March, 1876, obtained a summons calling on Andrew Agnew to attend before the presiding Judge in chambers, to shew cause why he should not be committed to the common gaol of the county of Carleton, he having on his examination pursuant to an order made in this Court on the 25th February, 1876, refused to disclose his property or his transactions respecting the same; and not having on the said examination made satisfactory answers respecting his said property, and it appearing from such examination that he has concealed or made away with his property in order to defeat or defraud his creditors, or some of them, or why a writ of *capias ad satisfaciendum* should not be issued upon the judgment in this cause against the defendant Andrew Agnew, &c., and why the defendant, Andrew Agnew should not pay the costs of and incidental to the application for the order of the 25th February, 1876, and of this application, &c.

The order for the examination of the defendants, Andrew Agnew and Flora Agnew, who were husband and wife, was in the usual form, under Con. Stat. U. C. cap. 24, sec. 41.

Flora Agnew was first examined. She swore among other things of having had several mortgages. One was a mortgage from her grandfather, David Buchan, for \$2,524. The mortgage was sold to Dr. Henderson. Her hus-

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band, Andrew Agnew, got the money. The latter gave her to understand that the money was to enable him to go into business, but she could not say what he did with it. She had a mortgage from Joseph Mureau and wife for \$400. This was also sold. The husband got the money. She also had a mortgage from Joseph Seguin and wife for \$400 or \$500. It was sold, and the money disposed of as in the case of the other two mortgages. There was also a mortgage for \$200 or \$300 from Frances Lelardia. It was sold with the others. She never got any of the money. The mortgages were, as she understood, sold to enable her husband to go into business, but he did not go into business. And she was unable to say what he had done with the money. He never told her what he did with the money. She authorized her husband to sell the mortgages and to have the money to go into business with. Her husband was in receipt of a salary of \$750 per annum. The moneys obtained for the mortgages, were not, she swore, spent in household expenses. But some of the money was spent at a time when her husband was out of employment. She could not say how much. There was money lent to a Mr. Geare, some time in the summer after the mortgages were sold. She swore that she had not herself now any property or means of satisfying the judgment.

The defendant, Andrew Agnew, was then asked to submit himself to examination. He did so. He swore that he had sold some mortgages belonging to his wife. The following then took place :

Ques.—Did you get money for your wife's mortgages which you sold? *Ans.*—I refuse to answer. I also refuse to answer who bought the mortgages. I also refuse to answer as to whether I negotiated the sale of the mortgages. I refuse to answer as to where Dr. Henderson lives. I have had money in my possession lately, but I cannot say how much. It might be \$100 or it might be more. I may have had over \$1000. I cannot tell you if I had \$2000, or how much I had. I have no books of account. I have used all the moneys which have come into my possession. I cannot tell when I got the money, whether it was in summer, fall, or winter. It was not a year ago. It was before I began to teach this season. I cannot tell if it was before or after I went to Mr. Geare.

Then the questions and answers were as follow:

Ques.—How long is it since you got that money? *Ans.*—I cannot distinctly say.

Ques.—Was it more than a month ago? *Ans.*—It was more than a month ago.

Ques.—Was it more than three months ago? *Ans.*—I think it was.

Ques.—Was it more than six months ago? *Ans.*—I cannot state.

Ques.—Was it more than four months ago? *Ans.*—I cannot state exactly whether it was four or six months ago.

Ques.—Was it before the snow fell? *Ans.*—That I cannot tell; I do not know when the snow fell.

Ques.—Was it last summer? *Ans.*—I cannot say.

Ques.—From whom did you get the money?

Ans.—The money was received from Mr. Chrysler, my counsel, who is acting for me to-day. The money has been used, and used in various ways. I cannot say to whom I gave it. It was given to various parties in various ways. Geare got some of it, but I cannot state exactly what amount. I did not get a note for it. I do not think that I took a note for any of it. Mrs. Agnew did not give me the money to go into business, but she told me that I might have it. I got the money for that purpose. I was doing business for Mrs. Agnew, and had connection with Geare's business for her. I cannot say that I told Mrs. Agnew about the business. I do not know if I told Mrs. Agnew about the money. In fact I told her very little as she was not very well. I think that I gave the money to Mr. Geare after I went there. It was not the money that I brought up from L'Orignal that I gave Geare. I left him when he was sold out by the sheriff. The money I gave to Geare, I got from Dr. Henderson. I do not know how much there was. I fancy I gave it to him in bills. It was money in some shape. There was no written agreement with Geare. There was an understanding that Mrs. Agnew was to get a share if anything was made. There was no money paid to Geare until after the mortgages were assigned. I kept no book with the account of Mr. Geare. Nor did I keep any memorandum of the money given him. Nor do I know how much I gave him. There are not any debts due to me that I am aware of. I have no notes or securities of any description. My salary is to be about \$750, paid monthly as I want it.

The affidavit filed on the granting of the summons shewed that the defendants, Andrew Agnew and his wife, at one time lived in L'Orignal; that the defendant, Andrew Agnew, previous to his marriage with the defendant, Flora Agnew, and for some time thereafter, was a

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High School teacher, and more recently and up to the spring of 1875, was bookkeeper and manager of the firm of Cumings, Buchan, & Agnew, extensive manufacturers of sawn lumber, at L'Orignal.

The summons to commit was, according to the affidavit of service, served on the defendant, Andrew Agnew, on the 1st of April, and was, according to the affidavit of service, shewn to him at the time of the service.

The summons was from time to time enlarged at the instance of the defendant.

Ritchie, shewed cause.

Osler, supported the summons.

HARRISON, C. J.—In case any party has obtained a judgment in any Court in Upper Canada, such party, or any person entitled to enforce such judgment, may apply to such Court, or to any Judge having authority to dispose of matters in such Court, for a rule or order that the judgment debtor shall be orally examined upon oath before the Clerk of the Crown, or before the Judge of the County Court, within the jurisdiction of which such debtor may reside, or before any other person to be named in such rule or order, touching

(1) His estate and effects.

(2) As to the property and means he had when the debt or liability, which was the subject of the action in which judgment has been obtained against him, was incurred.

(3) As to the property and means he hath of discharging the said judgment.

(4) As to the disposal he may have made of any property since contracting such debt or incurring such liability.

And in case such debtor

(1) Does not attend as required by the said rule or order, and does not allege a sufficient excuse for not attending.

(2) Or if attending, he refuses to disclose his property or his transactions respecting the same.

(3) Or does not make satisfactory answers respecting the same.

(4) Or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them.

Such Court or Judge may

(1) Order such debtor to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months.

(2) Or may direct that a writ of *capias ad satisfaciendum* may be issued against such debtor: Consol. Stat. U. C. cap. 24, sec. 41.

It was held that a plaintiff against whom a defendant had recovered judgment for costs only was not liable to be examined or committed under this enactment: *In re Hawkins*, 3 Pract. R. 239; *Hawkins v. Paterson*, 23 U. C. Q. B. 197. But the statute 27 & 28 Vict. cap. 25, afterwards passed, enacted that the words, "in case any party has obtained a judgment," shall, for all the purposes of the Act, be taken to mean as well a party defendant as a party plaintiff: and to extend to all judgments whatever the cause of action for which the same may be recovered." See *Herr v. Douglas*, 4 Pract. R. 124, and *Lovell v. Gibson*, 6 Pract. R. 132, as to the effect of the amending Act.

The enactment as amended is in the nature of a bankruptcy provision. Its object is, to aid a person having an unsatisfied judgment, in the recovery, if possible, of the amount of the judgment or some part thereof, and incidentally to punish the fraudulent disposal of property liable to execution.

The enactment in some respects resembles sections 220 and 221 of the former English Bankruptcy Act of 1849, (12 & 13 Vict. cap. 106.)

Section 220 provided that if any bankrupt, or the wife of any bankrupt, refuse to make or sign the declaration contained in the schedule to the Act annexed; or if any other person shall refuse to be sworn or answer any lawful question put by the Court, or shall not fully answer any such question to the satisfaction of the Court, or shall refuse to sign and subscribe his examination when reduced to writing, (not having any lawful objection allowed by the Court), or shall not produce any books, papers, deeds, and writings, or other documents in his custody, or power relating to any of the matters under enquiry, which such bankrupt, wife of the bankrupt, or person, is requested by the Court to produce, and to the production of which he shall not state any objection allowed by the Court, it shall be lawful for the Court by warrant to commit such bankrupt, wife of such bankrupt, or other person, &c., to (naming

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the prison,) there to remain until he shall submit himself to such Court to be sworn, and full answers make to the satisfaction of such Court to all such lawful questions as shall be put to him by the Court, &c.

Section 261 provided that if any person be committed by the Court for refusing to answer or for not fully answering any question put to him by the Court, such Court shall in its warrant of commitment specify every such question, &c.

It is provided by section 23 of our Insolvent Act, 38 Vict. cap. 16 (D.) that the Insolvent shall be bound to attend the first meeting of his creditors, and, after making such corrections as he may deem proper to his statement of liabilities and assets, shall attest the same under oath. He may also be examined under oath before the assignee by or on behalf of any creditor touching his affairs, and more especially as to the causes of his insolvency and the deficiency of his assets to meet his liabilities.

Section 24 of the same Act provides that the insolvent shall sign his examination, or declare the reasons why he refuses to sign, and the examination shall be attested by the assignee.

Section 25 of the Act makes provision for further examinations of the insolvent.

Section 140 of the Act provides that if the insolvent do not upon examination fully and truly discover to the best of his knowledge and belief all his property, real and personal, inclusive of his rights and credits, and how and to whom and for what consideration, and when he disposed of, assigned, or transferred the same or any part thereof, except such part has been really and *bona fide* before sold or disposed of in the way of his trade or business, or laid out in the ordinary family or household expenses, and fully, clearly, and truly state the causes to which his insolvency is owing, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor.

One great difference between the English Bankruptcy Act and our Consol. Stat. cap. 24 sec. 41, is that whereas under the former the examination may be of the bankrupt, his wife, or other person, the examination provided for under the latter, is of the judgment debtor only.

Another difference is, that while under the former the examination usually takes place before and in the presence of the commissioner or Court which has the power to commit, the examination under our Act usually takes place

before an officer of the Court whose duty it is to take it and note what takes place before him for the information of the Court or Judge, in the event of an application being afterwards made for an order to commit or for a *ca. sa.*

In *Bullen v. Moodie*, 13 C. P. 139, Chief Justice Draper said, "An error inadvertently committed, in taking down the words of an answer, or an omission to note some explanatory matter subsequently offered might give an unsatisfactory and evasive complexion to an answer which otherwise it would not wear. Even the precise words used would not always fully or accurately convey the true spirit of an answer, for the manner of reply or state of mind in which the party answering was at the moment might give to the words a very different bearing from their apparent simple meaning. Without going the length of asserting that a party who merely reads question and answer, and still more answer without question cannot in any case arrive at a correct conclusion as to whether such answer be unsatisfactory, I certainly think that such a course must give rise to much uncertainty, and to great risk of doing injustice, and therefore that in every case where the Judge has not heard the examination taken should hear the party before he commits for giving unsatisfactory answers."

The opinion of the learned Chief Justice in this particular was afterwards affirmed in appeal, and for the reasons given by him : *Ponton v. Bullen*, 2 E. & A. 379.

There is nothing in our Act to prevent the Judge himself taking the examination, and in that event, at once, without the formality of a summons to shew cause, committing the debtor for unsatisfactory answers: *Baird v. Story et al.*, 23 U. C. Q. B. 624. See also *Peck v. McDougall*, 27 U. C. Q. B. 353.

If a question or series of questions be put which the defendant refuses to answer, there should be some statement to that effect in the certificate of the examiner, either generally that questions of such a purport were put which the defendant refused to answer, or better still, that some specific question or questions were put setting forth the substance, and that the defendant would not answer them, or that the defendant's answers to such and such questions were not satisfactory, or giving questions and answers, so that it might be determined whether they are satisfactory or not. See Draper, C. J., in *McInnes v. Hardy*, 7 U. C. L. J. 295.

In *Ex parte Cousins*, Buck. 531, it was held,

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in the absence of any statutable provision to the contrary that a bankrupt when under examination cannot refuse to discover particulars relating to his estate and effects, although such information may tend to shew that he has committed a criminal act, but if the question be put to him whether or not he has done an act clearly of a criminal nature, he may refuse to answer. See further *In re Heath*, 2 Dea. & C. 214; *In re Feaks*, *Ib.* 226; *In re Smith*, *Ib.* 230.

In *Pratt's case*, 1 G. & J. 58, it was held that a bankrupt is bound to disclose all circumstances relating to his property and effects.

He must answer to whom and for what prices and when goods were sold in order that the *bona fides* of the sales may be ascertained: *In re Falk*, 2 Dea. & Chit. 415.

In *Ex parte Nowlan*, 6 T. R. 118, it was held, that if a bankrupt swear to an account which seems incredible he may be committed. See also *Ex parte Lloyd*, 16 M. & W. 462; *Ex parte Cuffield*, 5 Ir. L. R. 358.

If a sum of money is unaccounted for, and the bankrupt says "I will not tell what has become of it," he must thereby subject himself to the imputation of being unable satisfactorily to account, and to the consequences of that imputation: *Ex parte Oliver*, 1 Rose 413, 2 Ves. & B. 244; *Ex parte Cassidy*, 2 Rose 217; *Norris's Case*, 2 Jac. & W. 437; *Ex parte James*, 3 Deac. 518; *Ex parte Hicams*, 18 Ves. 237; *Davie v. Mitford*, 4 B. & Al. 356.

In *Ex parte Bradbury*, 14 C. B. 15, where the bankrupt in answer to enquiries as to why his brother's name was inscribed in a cheque for £100, and how the money was appropriated, merely said, that his memory did not serve him, his answer was held to be unsatisfactory. And per Jervis, C. J., "The substance of the answer is, 'I know nothing at all about the transaction,' that clearly could not be satisfactory. If the bankrupt had assigned any reason for his want of recollection the commissioner might have pursued the enquiry. But all enquiry was effectually closed by the answer. The bankrupt was bound to give some excuse or explanation for his somewhat extraordinary defect of memory."

The true test with regard to unsatisfactory answering is, whether the account given is such as a reasonable man ought to believe: *Re Courtney*, 3 L. T. N. S. 899; but answers are not to be deemed unsatisfactory merely because they do not account for the application of the

defendants assets in a proper manner: *Hobbs v. Scott*, 23 U. C. Q. B. 619. In order to make the answers unsatisfactory it should appear either that the debtor contumaciously refused to answer, or so equivocated as to render his answer in reality no answer at all: *Lemon v. Lemon*, 6 Prac. R. 184.

To justify a commitment of a bankrupt for not satisfactorily answering questions the examination should be full, fair, and searching: *Ex parte Legge*, 1 B. C. C. 163, 17 Jur. 415, 22 L. J. Q. B. 345, and the question to which the answer is said to be unsatisfactory must appear to be a material question: *Ex parte Baxter*, 7 B. & C. 673; *Ex parte Legge*, 2 B. C. C. 219.

The committal cannot be for any act or omission not comprised in the statute which gives the authority to commit: *Miller v. Seare*, 2 W. Bl. 1141.

Thus there is no authority to commit for refusing to read an entry in a book: *Ex parte Isaac*, 3 Y. & J. 39; *Isaac v. Impey*, 4 C. & P. 113, 10 B. & C. 442.

An order to commit for not attending, or for refusing to answer when attending, is to be looked upon as a commitment for contempt and not as a commitment in execution: *Henderson v. Dickson*, 19 U. C. Q. B. 592. So apparently is an order of commitment for unsatisfactory answers: *Ward v. Armstrong*, 5 Prac. R. 58.

The order to commit under our statute should be absolute, not conditional: *Chichester v. Gordon*, 25 U. C. Q. B. 527.

The statute does not give any form of order.

The power is, to commit to the gaol of the county in which the debtor resides: *Switzer v. Brown*, 20 C. P. 193; *In re Weatherly*, 4 Prac. R. 28.

In *Re Hadland*, 1 Dowl. P. C. N. S. 835, Mr. Justice Coleridge held, that the questions and answers deemed unsatisfactory should be particularized in the warrant of commitment. But the weight of authority is against this ruling: *Ex parte Harrison*, 1 B. & Ad. 410; *Ex parte Dauncey*, 4 Q. B. 668, 12 M. & W. 271; *Ex parte Ward*, 3 D. & L. 756.

A person illegally committed under colour of the Act may be discharged by writ of habeas corpus: *In re Hawkins*, 2 Prac. R. 239; *In re Munn*, 25 U. C. Q. B. 24; *In re Weatherly*, 4 Prac. R. 38; see further 3 Deac. R. 524, note. But the Court

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on the return to the writ may look at the examinations themselves to see whether the questions were upon a subject within the jurisdiction of the Commissioners : *Ex parte Harrison*, 1 B. & Ad. 410.

It has been held that Commissioners of Bankruptcy are not liable to an action of trespass for committing a person who does not answer to their satisfaction : *Doswell v. Impey et al.*, 1 B. & C. 163.

In this case it appears that the judgment is still unsatisfied : that it is against Andrew Agnew and his wife ; that the wife had at one time mortgages which if now held by her would be applicable to the satisfaction of the judgment : that she has not now the means of satisfying the judgment ; that the reason of her inability is, that she gave to her husband the mortgages and proceeds of mortgages which she owned to enable him, as she says, to enter into business or for some other purpose ; that he refuses to answer the question as to who bought the mortgages, or whether he negotiated the sale of the mortgages. He admits that he lately had money in his possession to a considerable amount : may have had over \$1000, but cannot tell if he had \$2000, or how much he had ; cannot say when he got the money ; cannot say whether it was four or six months ago ; and does not know how much money he gave Mr. Geare.

It appears to me that the defendant's answers, so far as made, respecting the money are not satisfactory. I also think that his refusals to answer are without excuse. But in the view which I take of the case, it is unnecessary to determine the latter point. His wife gave a very full and a very satisfactory account of all that she knew. Her examination bears a marked contrast to that of her husband. If she had not given the mortgages and money to her husband they would have been subject to execution under the judgment for her debt, as she is a judgment debtor. But she appeared in some manner, and for purposes which she mentioned but which he denied, to place them entirely at the disposal of her husband. How he disposed of them he refuses to say. What he did with the proceeds he does not satisfactorily shew.

I must in this case under the statute order the committal of the defendant Andrew Agnew for his unsatisfactory answers, if not for his refusal to disclose his transactions respecting property, which, according to the testimony of his wife, was his property.

The Act is certainly defective in not providing for the examination of the wife as to the husband's property, and the husband as to the wife's property, although the judgment is against one of them only, in order that the ownership of the property may appear from the examination. But when, as here, there is a judgment against both, and the wife, who at one time owned the property, admits that she gave it to the husband ; where the latter, as here, admits that he received the property, and although not admitting it was for the purpose she says, admits that she told him he might have it, where he does have it, and does not satisfactorily account for what he did with it, he is, it appears to me, subject to be dealt with under sec. 41 of the Consol. Stat. cap. 24.

In such a case I may either direct the issue of a *ca. sa.*, or order the debtor to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months.

In this case I am bound, having a proper regard to the Act, and the purpose for which it was passed, to adopt the second alternative, and order the committal of the debtor to the common gaol of the county of Carleton, being the county in which he resides, for the period of three calendar months ; and this I do on the ground that the debtor has not made satisfactory answers respecting property which, it appears to me, was liable as his property to satisfy the judgment in this cause.

Order accordingly.

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THE QUEEN ON THE RELATION OF PRESTON V.
TOUCHBURN.*Municipal elections—Irregularities—Substantially fair election.*

A municipal election will not be set aside on account of an official having disregarded or neglected some direction of the Ballot Act if the election has been conducted in a manner substantially fair, and the mistake or misconduct has not affected the result of the election.

[March 20, 1876.—*Harrison, C. J.*]

The statement complained that Robert Touchburn usurped the office of Reeve of the township of Manvers, under pretence of an election held on the 3rd of January, 1876, at the township of Manvers, and declaring that the relator had an interest in the election as a candidate, shewed the following causes why the election of Robert Touchburn should be declared void :

1. That in two out of five of the Electoral Divisions into which the township of Manvers was divided, the polling places in two divisions were kept open in such a manner that several persons, voters in the said Electoral Divisions, were allowed to enter, and did enter the said polling places at one and the same time, and were allowed to remain and continue therein while voters marked their ballot papers.
2. That other persons were allowed to enter with the voter behind the compartment and remain with him while he was marking his ballot paper, in three of the said Electoral Divisions.

The statement was in the usual manner vouched by the relator, who stated also that he believed and was advised that the causes alleged were well founded and sufficient in law to avoid the election.

The relator also made a special affidavit. In it he swore that he was informed by one Hamilton Kennedy, and verily believed, that during the hours of polling at the Electoral Division number two, the polling place where the election was held was open to as many persons as chose to enter, and that several persons, voters and others (not giving any names) were permitted to enter and did enter at the same time, and remained in the polling place while voters were being taken ; that Robert Brown, the returning officer of Electoral Division number two, one William Steele, agent of the defendant, one Charles Porter and one Andrew Benson, brother of Robert Benson, were present at the polling place during the day of the election, and fre-

quently went in with the voters behind the compartment while the voter was marking his vote on the ballot paper.

He also swore that he was informed by one William Ward, and verily believed, that one Andrew Benson, in the presence of the returning officer, Robert Benson, took a ballot paper off his (the Returning officer's) table, and giving it to one Simon Jennings, a voter in said division, pointed to him in what way he was to vote, and after Jennings had voted the ballot paper was thrown open to ascertain for whom he had cast his vote, and during this time Thomas Benson, the father of Andrew Benson, Andrew Benson, the son, and Charles Porter were all in this polling place, and after the poll was closed, and while and during all the time the ballots were being counted they remained in the place ; that the ballot papers in this division were numbered, commencing with the figure one, and continued in consecutive order in the same manner as the poll book, and the poll book was left lying on the returning officer's table in such a manner that voters and others could discern which way the particular voter had given his vote.

He also swore that he was informed by one Charles Porter, and verily believed, that the said Porter, during the hours for voting, presented himself at the polling place of division number three, for the purpose of voting ; that one Richard Touchburn asked him for whom he was going to vote, and on naming relator, Richard Touchburn said there was no time, and one Thomas Gillies, apparently acting as a constable, ordered Porter out of the polling place, without having recorded his vote ; that just after one James Foster had come out from voting the returning officer for division number three, one Charles Gillies, a nephew of Robert Touchburn, or Thomas Gillies, the constable before mentioned, appeared at the door of the polling place and called out that there were only two minutes more to vote before the poll would be closed, and thereupon Foster entered to vote, but was told there was no time, as already stated.

He also swore that he was informed by one James Carles, and verily believed, that when he entered the polling place number three to cast his vote, Thomas Gillies, before named, asked him for whom he was going to vote, and upon his replying that it was none of his business, that the said Foster marked his ballot paper, and upon his returning with it to the returning

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officer, Gillies snatched it from his hand and threw it on the table before the returning officer.

There were affidavits of Hamilton Kennedy and William Ward, respectively, corroborating the statements which they made to the relator mentioned in his relation.

There was also filed the affidavit of Robert Weston Preston, the agent of the relator, at polling division number five, to the effect that the polling place was open in such a way that several voters and others could enter and did enter it without let or hindrance during the legal hours of polling (but not giving any names); that he saw several voters (not giving names) going behind the compartment required by law to be in each polling place, in company with the returning officer, David McGill, and then deposited their respective ballot papers in the ballot box; that after the closing of the poll the returning officer took the ballot box and opening it, tumbled the ballot papers from the box on the floor, and calling the names from the ballot papers of the several candidates, the clerks or agents present checked the numbers, and that after this was done the returning officer put the ballots again into the box, closed and locked it, and then, addressing those present, said he would take it (meaning the ballot box) home, and fix or count the ballots to satisfy himself, or words to that effect.

Robert Benson, the returning officer of the second division, was made a party to the proceeding in the order of Mr. Dalton.

J. D. Armour, Q. C., for the defendant, submitted that the case of the relator, if unanswered, was not sufficient, but filed several affidavits in answer :

1. As to polling division number five, he filed the affidavit of Robert Robinson, the authorized agent of the defendant in that division. He admitted that on two occasions whilst no votes were being recorded or offered, voters and others standing outside the polling place were allowed to enter to get warmed, but on neither occasion were the parties allowed to remain more than a few minutes, and that it was not true that several voters went behind the compartment in company with the returning officer, David McGill, and that the voters returned from the compartment with David McGill, and then deposited their respective ballot papers in the ballot box. He also filed the

affidavit of David McGill, the returning officer, to the same effect. In addition he swore that the polling place in the division was at the school house of school section number ten, and is an isolated building a considerable distance from any other dwelling house, and that the day was cold and stormy. He also swore that after the election he counted the ballot papers, made up the written statement required by law, and disposed of the ballots as required by law.

2. As to polling division number three, Mr. Armour filed the affidavit of Richard Gillies, who was the returning officer of that division. He swore that it was after five o'clock when Charles Porter presented himself to vote. Mr. Armour also filed the affidavit of Thomas Gillies, the constable. He denied that he snatched the ballot paper of Foster and threw it down, as alleged on the other side, and that when he spoke of hurrying up a voter he did not know the time but supposed it was not five o'clock. Richard Touchburn also made an affidavit. He explained what took place between him and Charles Porter. He swore that Porter was illiterate, and that the time was up before he tendered his vote.

3. As to polling division number two. The affidavit of Robert Benson the returning officer, was filed. He explained what took place as to Jennings's vote, shewing that there was nothing wrong. While he admitted that the day was cold, and that parties were allowed to enter the polling place to warm themselves, he denied that they were allowed to go near the balloting department. He admitted that he numbered the ballot papers in accordance with the poll book, but swore he did so under instructions from the township clerk. He also explained what he did in regard to illiterate voters, shewing that there was nothing wrong in his conduct. An affidavit of Andrew Benson was also filed corroborating the preceding affidavit.

An affidavit of the defendant was filed. He shewed the votes to be as follows :—

	Sotus No. 1.	Baleybuff No. 2.	Galloway No. 3.	Bethany No. 4.	North No. 5.	Total.
Preston	13	16	47	78	11	165
Touchburn	76	62	35	29	64	266

He denied that William Steele was his agent. He swore that the day was cold; that the polling

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places in the various divisions of the township were at considerable distances from any place of public entertainment or other places where parties coming to vote could find shelter or warmth; but that there was not to his knowledge at any of the polling places any interference with the voters in the freedom of the franchise.

The relator sought to file additional affidavits in support of the allegation contained in the statement, but not materially strengthening the case. The defendant objected, and the case was argued without reference to them.

Armour, Q. C., cited 38 Vict. cap. 28, sec. 16, of the Election Act of last session; *Woodward v. Sarsons*, 32 L. T. N. S. 867; *The Bolton Case*, 2 O'M. & H. 152; *Northcote v. Pulsford*, L. R. 10 C. P. 476.

John McBride, contra, referred to secs. 4, 13, 17, 27, 28, 30, 31, 32 and 40 of 38 Vict. cap. 28, O., in connection with the evidence as shewing that the provisions of the Act had been grossly violated and that in consequence the election ought to be set aside.

HARRISON, C. J.—It is directed by sec. 4 of 38 Vict. cap. 28, O., that every polling place shall be furnished with a compartment, in which voters can mark their votes screened from observation, and it is made the duty of the clerk of the municipality and returning officer, respectively, to see that a proper compartment for that purpose is provided at each polling place.

It is the duty of the returning officer under sec. 10 to lock and seal the ballot box, and to keep it so locked and sealed.

During the time appointed for polling no person is to be entitled or permitted to be present in any of the polling places other than the officers, candidates, clerks, or agents authorized to attend such polling place (section 17).

It is under sec. 32 the duty of every officer, clerk, and agent in attendance at a polling place to maintain and aid in maintaining the secrecy of the voting at the polling place.

Other provisions not necessary to be specially mentioned are enacted by the same section for the maintaining of secrecy, and the punishment of persons acting in contravention of the statute.

I am not satisfied in this case that there has been any wilful violation of the provisions of

any of these sections on the part of the returning officers or other persons concerned in the election. But even if I were so satisfied, I would not on that ground alone set aside the election.

It is by sec. 38 of the Act enacted, that no election shall be declared invalid by reason of non-compliance with the rules contained in that Act, as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to the Act, if it appear to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the Act, and that such non-compliance or mistake did not affect the result of the election.

So it is, by sec. 16 of the Act of last session, respecting certain proceedings at Municipal Elections, declared that no election shall be declared void by reason of any irregularity, if it appear to the tribunal having cognizance of the question that the election was conducted in substantial accordance with the intention of the law, and that the non-compliance or mistakes did not effect the result of the election.

Officers and others who violate the directions of such an Act are liable to be punished in the manner the Act prescribes, but in the absence of some express declaration it would be manifestly inconvenient and unjust to set aside the election for the mere irregularity or misconduct of the officers or others than the candidates concerned in the election.

The thing to be obtained is, a fair election substantially according to law, and if this appear to have taken place, resulting in a majority to some one or more of the candidates, that result should not be disturbed merely because some officer or person has disregarded or neglected some direction of the statute deemed necessary by the Legislature to secure a proper election.

This has always been a cardinal rule in election law: see *The Queen ex rel. Walker v. Mitchell*, 4 Prac. R. 218; *Monck Election Case*, 32 U. C. Q. B. 147; and see further *Reg. v. Cousins*, 28 L. T. N. S. 116; *Reg. v. Ward*, L. R. 8 Q. B. 210.

The sections which I have quoted do little more, if anything, than affirm this rule.

If has said by Lord Coleridge in *Woodward v. Sarsons et al.*, 32 L. T. N. S. 871, "If the tribu-

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nal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied, either that a majority had been, or that there was reason to believe, that a majority *might* have been, prevented from electing the candidate, they preferred them, we think, the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. This we think is the result of comparing the judgments of Grove, J., at *Hackney*, 31 L. T. N. S. 69, 2 O'M. & H. 77, with the judgment of Martin, B., at *Salford*, 20 L. T. N. S. 120; 1 O'M. & H. 139, and with that of Mellor, J., at *Bolton*, 31 L. T. N. S. 194, all which judgments are in accordance with, but express more accurately the grounds of the decisions in Parliament in the older cases; *Norfolk*, 9 Jour. 631, Heyw. Co. 446; *Morpeth*, 1 Doug. 147; *Pontefract*, 1 Doug. 227; *Coventry*, 15 Jour. 276; *New Ross*, 2 P. R. & D. 198, and *Drogheda* W. & D. 206, all of which are mentioned in Rogers on Elections, 10 ed. p. 365 *et seq.* * * *

It is not enough to say that great mistakes were made in carrying out the elections under these laws, it is necessary to be able to say that either wilfully or erroneously the election was not carried out under these laws, but under some other method. For instance, if during the time of the old laws, with the consent of the whole constituency, a candidate had been elected by tossing up a coin, or by the result of a horse race, it might well have been said that the electors had elected by their free will, but it should have been held that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed election by voting. So now, when the election is to be by ballot, if either wilfully or erroneously, a whole constituency were to vote, but not by ballot at all, the election would be a free exercise of the will, and, therefore, not an election under the existing law. But if, in the opinion of the Court, the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act would justify the tribunal in declaring the election void by the common law of Parliament."

In a subsequent part of the same judgment the same learned Judge says "The non-observance of the rules or forms which is to render the election invalid must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did

affect or might have effected the majority of voters, or, in other words, the result of the election."

There is nothing to shew that the alleged mistakes or misconduct relied upon by the relator in this case, even if established on the evidence, in any manner did affect or could affect the result of the election.

Looking at the facts laid before me I see no ground for thinking that the result would have been different if the irregularities complained of had not occurred.

I must, therefore, render judgment for the defendant and the returning officer, with costs to both, to be paid by the relator.

Judgment for defendants.

QUEBEC BANK v. HOWE.

Wife's separate estate—35 Vict. c. 15, s. 9—*Pleading.*

Action against a married woman on a promissory note.

Plea, *coverture*. Replication, that the note was made with respect to property which was defendant's separate property, within the meaning of 35 Vict. cap. 16, sec. 9. There was also a replication on equitable grounds that the defendant had separate estate.

Held, that the first replication must be struck out as unnecessary and embarrassing.

[May 5, 1870.—*Mr. Dalton.*]

This action was brought against a married woman on a promissory note. She pleaded *coverture* at the time of contracting the debt; whereupon the plaintiffs replied that the note was made with respect to property, which was the defendant's separate property within the meaning of the statutes on that behalf.

Ritchie obtained a summons to shew cause why the replication should not be struck out, on the ground that a married woman cannot be made liable unless she has a separate estate held to be such in *Equity*.

Brough shewed cause.

Ritchie, contra. The plaintiffs have already a replication on equitable grounds, setting up that the defendant had a separate estate, which

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is all that they require. The replication is embarrassing, as under it the plaintiffs might prove that the defendant had property within the meaning of C. S. U. C. ch. 73, and succeed on such proof. But it has been held in *McGuire v. McGuire*, 23 C. P. 123, and other cases, that such property is not separate estate within the meaning of 35 Vict. cap. 15, sec. 9, so as to make a married woman liable on a contract made with reference to it.

MR. DALTON thought that the replication was unnecessary to the plaintiffs, and embarrassing to the defendants, and should therefore be struck out.

Order accordingly.

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Discovery—Communications between attorney and client.

Held, that a letter written by the agent of a bank to his manager at the dictation of the solicitor for the bank, and the reply to it, were privileged communications and not liable to production.

[June 26, 1876.—*Mr. Dalton.*]

A summons was obtained for the re-examination of the plaintiff's manager in Toronto, and the production by him of a letter of his written to the general manager in Montreal, and a letter written in reply by the latter. On a former examination, the production of these letters was refused, on the ground that they were privileged as containing an opinion by the plaintiff's attorney as to the validity of the defendant's endorsement on certain promissory notes, which endorsement had been given by another party acting under a power of attorney from the defendant.

Rae shewed cause. The affidavit of the attorney for the bank shews that the first of these letters was in effect his opinion on the point submitted to him, having been taken down by the writer from his verbal statement, and read over to him before it was dispatched, and that when he gave the opinion he was convinced that litigation would spring out of the facts on which it was based. It is also shewn by an affidavit of the Toronto manager, that the letter written

in reply to his own was written with reference to the opinion and would certainly disclose it. The letters clearly come within the well established rule that makes communications between attorney and client privileged. This rule is of even wider application than it used to be, and now applies to all communications made by an attorney in his professional capacity to his client, even though made with reference to no present or prospective litigation. The authorities are collected in *Minet v. Morgan*, L. R. 8 Chy. 361, where reference is made to the wider application of the rule now than in former times. This case has been followed in *Hamelyn v. Whyte*, 6 Prac. R. 143. The second letter is equally privileged with the first—the opinion was given to the corporation as a whole, and the letters were both written by its officers, and had immediate reference to the same subject-matter.

Biggar contra. The cases relied upon by the plaintiff's counsel are all Chancery cases, and turn mainly on the question of title. In these cases the liability to produce is much less, and the privilege much wider, than in any other. The Common Law jurisdiction as to inspection, under sec. 197 of our C. L. P. Act (Imp. Stat. 14 & 15 Vict. cap. 99, sec. 6) is extended by secs. 189 and 190, which are taken from the Imperial Act of 1854 (cap. 125, secs. 50 and 51), and is now wider than the equity jurisdiction as to discovery : *Woolley v. North London Railway Company*, L. R. 4 C. P. 612. It is "limited only by what the Court thinks just," (*per Erle, C. J.*, in *Daniel v. Bond*, 9 C. P. N. S. 716, approved in *Hill v. Campbell*, L. R. 10 C. P. 222). The letters in question were neither written by the solicitor, nor to him. Even should the first letter be considered as coming in effect from him, and being therefore protected from inspection, the second letter could not be viewed in that light. It cannot be maintained that every letter which might be written, containing reference to the solicitor's opinion, is equally privileged with the opinion itself. The question for the Court is, whether the ends of justice would be served by the production of the document, and the defendant in this case believed that these ends would be served by the production of the letter, since it would shew that the plaintiffs were aware that the party who endorsed the defendant's name on the notes had no power to do so. The rule laid down by Brett, J., in *Woolley v. North London Railway Company* has been followed in *Wiman v. Bradstreet*, 2 Chy. Cham. 77, and in *Toronto Gravel Road Co. v. Taylor*, 6 Prac. R. 227, while the last English

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case on the subject, *Smith v. Daniell*, L. R. 18 Eq. 649, (July, 1874), is strongly in favour of the defendant's contention.

MR. DALTON thought that both letters were privileged under the general rule as to communications between attorney and client. The

object of the rule would be defeated if parties were allowed to arrive indirectly at the purport of such communications by obtaining inspection of such documents as those in question in this case.

Summons discharged.

DIGEST OF CASES.

ABATEMENT.

1. *Dismissing bill—Bankruptcy of sole plaintiff.*]—A motion by a defendant to dismiss after an abatement by the bankruptcy of a sole plaintiff and before revivor, was refused; his proper course being to serve the assignee of the plaintiff in insolvency with notice to revive within a limited time.—*Cameron v. Eager*, 117.

2. A sole defendant, by whose insolvency the suit is abated, may nevertheless move to dismiss the bill for want of prosecution.—*Riddell v. Ritchie*, 205.

ABSCONDING DEBTOR.

Setting aside attachment—Intent.]—*Held*, that the question as to the intent with which a person, whose property has been seized under a writ of attachment left the Province, can be tried on affidavit, on an application to set aside the attachment.—*Jackson v. Randall*, 165, and see 24 C. P. 87.

ACTION.

Civil right to recover expenses incurred in criminal prosecution—Pleading.]—Plaintiff sued defendant for money of which he had robbed him, and for the money he had spent in a criminal prosecution for the crime, and for damages for the trespass. The second count of the declaration was for trespass. The third count set out the robbery, the conviction, and that plaintiff had been put to expense in bringing defendant to justice, whereby the latter became liable to the former for the sums so expended.

Held, that though the third count might be good in trespass, it was not so in assumpsit, and that either the second or third count must be struck out.

Quare, whether the plaintiff could recover his expenses and outlay in this action.—*Pettit v. Mills*, 297.

See NOTICE OF ACTION.

ADDING PARTIES.

See AMENDMENT.

ADMINISTRATION ORDER.

1. *Representative to deceased party.*]—An order had been made for the administration of the estate of an intestate, accounts had been taken under it, and the Master had made his report, but before it was filed or confirmed the administratrix died. No one could be found who was willing to administer to the estate, which was insolvent. The Court thereupon, under Order

56, made an order appointing as administrator *ad litem* the person who had been guardian of the infant heirs of the intestate on the application for the administration order, he having also been solicitor for the administratrix in her lifetime.—*Re Tobin, Cook v. Tobin*, 41.

2. *When administrator may apply.*]—The fact that the assets of an intestate's estate are less than the liabilities is sufficient to justify an application by an administrator for an administration order, notwithstanding that the estate consists solely of personality.—*Swetnam v. Swetnam*, 149.

3. *Will not proved.*]—An administration order applied for against a person named in the will as executor, but who had not taken out letters of probate, was refused.—*Outram v. Wyckhoff*, 150.

4. *One executor proving will.*]—A testator devised his real estate to two persons as his executors, but only one of them proved the will. An application by a person claiming to be a legatee and creditor for an administration order was dismissed, the executor who had proved the will having alone been served with notice, and it not being shewn that the other executor had renounced or disclaimed. It was also not shewn that the legacy to the applicant had vested, or that he was a creditor of the testator.—*Re Pettee, McKinley v. Beadle*, 157.

5. *Ex parte—No assets.*]—An administrator is entitled *ex parte* to an administration order, where the liabilities of the estate exceed the assets.—*Re Ette*, 159.

6. *All executors not served.*]—An administration order will not be granted when all the executors who have proved have not been served.—*Re Freeborn*, 188.

7. *Consolidation.*]—Where the plaintiff was a beneficiary under the wills of I. and T., and the estate of I. had claims upon the estate of T., and the executors of I. were the administrators with the will annexed of the estate of T.: an order was granted for the administration of the estate of I., and the proceedings were consolidated with those under an order already obtained for the administration of the estate of T.—*Re Adams, Adams v. Muirhead*, 283.

8. *Costs.*]—A motion for an administration order was refused with costs, on the ground that the personal representative of deceased was not a party. Affidavits had been filed in answer to the motion on the merits.

Held, that the costs of only so much of these affidavits should be allowed as would be equivalent to a demurrer.—*Irwin v. Bick*, 182.

DIGEST OF CASES.

ADMINISTRATOR.

See ADMINISTRATION ORDER—EXECUTOR.

ADULTERY.

See ALIMONY, 2.

AFFIDAVIT.

A., B. and C. were partners, doing business in Chancery. A., B. and D. were partners, doing business at Common Law. An affidavit tendered by C. on an application in Chancery was rejected, it having been sworn before D.—*Dunn v. McLean*, 95.

AGENT.

See ATTORNEY AND AGENT.

ALIMONY.

1. *Interim—Wife's means of support.*]—A plaintiff makes out a *prima facie* case for interim alimony by producing (1) an office copy of the bill (which need not be verified by affidavit), and (2) proof of marriage; but if the defendant oppose the application on the ground that the plaintiff has ample means of support, unless she can shew the contrary to be the case, her application will be refused.—*Smith v. Smith*, 51.

2. *Interim—Adultery.*]—The question whether the plaintiff has been guilty of adultery cannot be raised on an application for interim alimony.—*Campbell v. Campbell*, 128.

3. *Interim—Consent to return.*]—The fact that the plaintiff has left the defendant and refuses to return to him, although he is willing to take her back to live with him, is no answer to an application for interim alimony.—*Wilson v. Wilson*, 129.

4. *Interim—Con. Order 488.*]—An omission to make the endorsement directed by Con. Order 488 to be made upon the office copy of the bill served, does not dis-entitle the plaintiff to apply on motion for interim alimony, but is a question merely affecting the costs of the motion. Where a plaintiff had neglected to proceed to a hearing at the first hearing term after issue joined, it was held that this was no bar to her obtaining interim alimony; it appearing that the neglect was owing to a mere slip on the part of her solicitor, that she had a *bona fide* intention to go to a hearing and had made offers to change the venue, with a view to enable the cause to be speedily heard.—*Paterson v. Paterson*, 150.

5. *Postponing hearing.*]—The usual undertaking given by the plaintiff on obtaining the order for interim alimony (viz., to proceed to a hearing at the first possible sittings), was extended to the next sittings, where the defendant had failed, and wilfully refused to pay interim alimony and disbursements which he had been directed to pay.—*Bowslaugh v. Bowslaugh*, 209.

See LIS PENDENS.

AMENDMENT.

1. *Adding party.*]—A party plaintiff may be added under a praecipe order to amend.—*Dunn v. McLean*, 97.

2. *Striking out party.*]—Neither a party plaintiff nor a party defendant can be struck out under a praecipe order to amend.—*Ib.*

3. *Expiry of time for.*]—After the expiry of the term limited by an order to amend, the right of the plaintiff to amend under such order is strictly gone, but the defendant's right to object to amendments made after the period limited may be waived.—*Waterous v. Farran*, 31.

4. *Altering bill.*]—A plaintiff will not be permitted to convert a bill by amendment into a new bill for different relief.

If, in making such amendments as, subject to this restriction, he is justified in making, a plaintiff strikes out allegations so as to render the answer to them useless, an application may be made by the defendant answering for his costs thus unnecessarily incurred. Such application should be made at the hearing.

After answer, liberal addition to the bill by amendment, retaining the original allegations, is proper, even though rendering a new defence necessary, and the costs of such amendment are proper costs in the suit.—*McGillivray v. McConkey*, 56.

5. 36 Vict. c. 8, sec. 50—*Staying sale under decree.*]—The mortgagor in a suit for sale having become insolvent after decree, but before the day appointed for redemption, the plaintiff, without reviving the suit, took out a final order for sale, and the proceedings for having the sale were completed.

On the motion of the assignee in insolvency to make him a party, and to set aside the proceedings for sale as irregular, and to stay the sale, an order was made adding the assignee as a party, pursuant to the powers of amendment conferred by sec. 50 of the Administration of Justice Act, 1873, but without staying the sale, as it did not appear that any injury would result from its being allowed to proceed.

Observations on the policy of the Court as to staying sales under decrees.—*Hoskins v. Johnston*, 256.

See EJECTMENT, 2—LAW REFORM ACT—MUNICIPAL LAW, 5—NOTICE OF ACTION—NOTICE OF TRIAL, 5—PLEADING, 5.

ANSWER.

1. *Filed without authority.*]—Two defendants moved to set aside a notice of hearing and to strike the cause out of the hearing list, on the ground that the answer of a co-defendant had been filed without authority from him.

Held, that the party whose name had been improperly used was the only person who could move to set aside the proceedings.—*Quartz v. Smeltzer*, 126.

2. *Shortening time to.*]—The time allowed by

DIGEST OF CASES.

Con. Order 90 to a defendant residing in the Isle of Man for answering a bill being six months, an order was granted shortening the time to ten weeks, in view of the facility of communication with the Isle of Man, it being geographically, though not strictly, within the United Kingdom.—*Bloomfield v. Brooke*, 205.

APPEAL (COURT OF).

1. *Application for further time.*]—Application to extend the time for giving notice of intention to appeal to the Court of Appeal, on the ground that the attorney for the party desiring to appeal had omitted to give the required notice within the prescribed fourteen days. There had been a delay of a month in making the application.

Held, that the mere statement of an unexplained “oversight” on the part of the attorney was an insufficient reason for granting the leave, though it might be otherwise if there were an important question of law involved, as to which there was a conflict between the Courts.—*Gordon et al. v. Great Western R. W. Co.*, 300.

2. *Allowance of bond.*]—A party opposing the allowance of a surety’s bond for security for costs of an appeal, may read affidavits in opposition to the surety’s affidavit of justification.—*Campbell v. Royal Canadian Bank*, 43.

3. *Entitling bond.*]—An appeal bond is properly entitled in the cause in the Court below.—*Ib.*

Costs—Decree reversed.]—See COSTS, 5.

APPEAL FROM MASTER’S REPORT.

See MASTER IN CHANCERY.

ARBITRATION AND AWARD.

1. *C. L. P. Act, sec. 158—Compulsory reference.*]—Under the above section a country cause may be referred to the arbitration of an officer of the proper Court at Toronto, as well as to the County Judge.—*Bigelow v. Cleverdon*. 3.

2. *C. S. U. C. c. 22, s. 167—Effect of insolvency of parties.*]—By the terms of a contract between Catlin & Co. and the defendants, a railway company, it was agreed that all matters in dispute between the parties arising or to arise out of or connected with the contract should be settled by arbitration. Catlin & Co. became insolvent, and this suit was brought by their assignee in insolvency to recover the cost of the construction of the railway.

Upon the application of the defendants under sec. 167 of the C. L. P. Act (C. S. U. C. 22), an order was granted staying all proceedings in this suit, it being held that the circumstance that the contractor had become insolvent did not take the case out of the statute.—*Johnson v. Montreal & Ottawa R. W. Co.*, 230.

3. *Attendance of witnesses—Subpoena to another Province.*]—Upon a submission to arbitration being made a rule or order of Court, a suit is pending within the meaning of C. S. C. c. 79, sec. 4, so as to enable the Superior Courts of

Law and Equity to issue process to compel the attendance, before arbitrators, of witnesses resident out of the jurisdiction of the Courts.—*Elliott v. Queen City Ass. Co.*, 30.

4. *Award—Umpire deciding without hearing evidence orally.*]—*Held*, that an award decided by an umpire who does not hear the witnesses himself, but takes their evidence from the notes taken by the arbitrators, and from their statements of the nature of it, will be set aside, unless there was an express consent to such a course by both parties.—*Morden v. Widdifield*, 179.

5. *Making award order of Court.*]—The fact that a submission or award relative to personality is made out of the jurisdiction of the Court, is no objection to its being made an order of Court.—*Re Coombe et al. and Cockburn*, 158.

6. *Arbitrator’s fee—Judge of County Court—Counsel fee at trial.*]—*Held*, that when a reference is made from *Nisi Prius* to a Judge of a County Court by name, adding his description, Judge of a County Court, and not to him as Judge of the County Court, he is entitled to his fees as such arbitrator.

Held, also, that a counsel fee may be taxed for the trial, although the case is referred to arbitration without being entered upon.—*Wood v. Foster*, 175.

ARREST.

For too much—*Costs—C. L. P. Act, sec. 322.*]—*Held*, that unless a defendant has been both “arrested” and actually “held to special bail,” he cannot take the benefit of sec. 322 of C. L. P. Act as to costs.—*Lyght v. Canute*, 181.

ATTACHMENT.

1. *Against a party out of jurisdiction.*]—Where a defendant, in default for non-compliance with a direction of a Master, was resident out of the jurisdiction of the Court:

Held, that an order for an attachment against him could be properly made.—*Bloomfield v. Brooke*, 264.

Disobedience of order—Con. Gen. Order 293.]—A motion to commit defendant, or to take the bill *pro confesso* for non-attendance of defendant for examination, pursuant to a special order, was refused where the order had not been previously served.—*McAvilla v. McAvilla*, 311.

See MARRIED WOMAN, 8.

ATTACHMENT OF DEBTS.

1. *C. S. U. C. c. 24, s. 19—Solicitor’s lien.*]—A sum of money directed by a decree or order to be paid is a debt which is attachable under C. S. U. C. c. 24, s. 19.

Upon the application of a solicitor, having a lien in respect to a debt attached, the attaching order will be discharged as against him; but the party against whom such an order has been made is not entitled to its discharge on the ground of the existence of the lien in favour of his solicitor.

DIGEST OF CASES.

Where an application for the discharge of an attaching order was made nominally by a plaintiff, against whom the attaching order had been granted, but really by and for the benefit of his solicitor, who had a lien on the debt attached, leave was given to amend the proceedings by making the solicitor the applicant, and the order was discharged, but without costs.—*Cotton v. Vansittart*, 96.

2. *Disobedience of a direction of a Master—Evidence of default.*]—A party moving to commit for disobedience of any order or direction of a Master, must shew by means of a certificate of the Master that the person moved against has disobeyed the order, and is in default.

It will be insufficient in Chambers to prove by any other means the service of the order, and that it has not been complied with, as the Master is the proper person to decide both these facts.—*Paxton v. Dryden*, 83.

See PRODUCTION OF DOCUMENTS, 15.

ATTORNEY AND AGENT.

Toronto solicitor agent for both parties.]—A Toronto agent cannot, as agent for one country principal, serve himself as agent for another.—*Horseman v. Coulson*, 263.

See SERVICE OF PAPERS, 4, 5.

ATTORNEY AND SOLICITOR.

1. *Summary jurisdiction—Liability of surviving members to account.*]—Semblé, when one member of a firm of solicitors has died, the summary jurisdiction of the Court can no longer be exercised over the survivors, because such an application may necessitate the taking of the partnership accounts, and the representatives of the deceased partner are necessary parties.—*Re L. & M. (Solicitors)*, 21.

2. *Jurisdiction of the Referee.*]—The Referee has no power to exercise summary jurisdiction over solicitors; such jurisdiction can only be exercised on an application to the Court.—*Ib.*

3. *Communications between solicitor and client.*]—Communications between solicitor and client are privileged, no matter at what time made so long as they are professional and made in a professional character.—*Hamelyn v. Whyte*, 143.

4. *Endorsement of name—Gen. Orders 40, 41.*]—The endorsement of the name and place of business of the solicitor conducting proceedings is by Con. Order 40 and 41, required on the first writ served out or proceedings filed, but is not essential on the first paper served.—*Redman v. Brownscombe*, 83.

5. *Changing—Costs.*]—The plaintiff had paid costs of a suit to A., of the firm of A. & B., his attorneys. A. & B. dissolved, B. retaining the suit. Application to change attorney to A. granted, without any condition as to payment of costs.—*Stater v. Stoddard*, 299.

6.—*Payment of money to.*]—The retainer of an

attorney or solicitor to collect a demand, and to take such proceedings as he may deem proper to effect this object, gives him authority to receive the amount before or after suit, and to discharge effectually the party making the payment, unless the client restricts or terminates the authority given to his attorney or solicitor.—*Moody v. Tyrrell*, 313.

7. *Nominal plaintiff.*]—A client who is merely a nominal plaintiff, being in this case the person in whose name an election petition had been filed, and who lent his name for the purpose of convenience, and was not held responsible by the attorney for his costs, is not entitled to an order on the attorney for delivery of his bill of costs, &c.—*Re Attorneys*, 319.

8. *Taxation—Substituted bill.*]—On an application to refer an attorney's bill to taxation, an amended bill of costs was allowed to be substituted for the bill delivered to the client; the attorneys undertaking to receive in full of their fees, charges, &c., the amount of the original bill, or the amended bill as taxed, whichever might be the least.—*In re B. & S. (Attorneys, &c.)*, 18.

9. *Taxation—Party liable to pay.*]—An assignee in insolvency employed a firm of attorneys to perform certain services in connection with the estate. Subsequently he resigned his position, and gave those attorneys the moneys of the estate remaining in his hand, with instructions to pay their own costs and hand the balance to the new assignee. They did so, and rendered their bill of costs.

Held, that the second assignee was entitled to have the bill taxed.—*In re A. & B. (Attorneys, &c.)*, 68.

10. *Taxation after lapse of twelve months—Payment.*]—On an application under C. S. U. C. c. 35, sec. 30, for taxation of a solicitor's bill, after the expiration of twelve months from its delivery, the special circumstances relied upon by the petitioner to entitle him to an order must be specified in the petition, and must be proved by proper evidence.

Where alleged overcharges constituted the special circumstances relied upon, and these were not specified in the petition, were not apparent by the production of the bill itself, and were not otherwise proved, an order for taxation was refused with costs.

A payment within C. S. U. C. c. 35, sec. 42, means a payment of the whole amount, or some specific portion of the amount claimed to be due in respect of the bill of costs.—*In re Gildersleeve and Walkem (Solicitors)*, 117.

11. *Fees of counsel—Taxation.*]—A bill for counsel fees exclusively may be referred to the taxing officer for taxation.—*In re C. K. & C. (Solicitors)*, 226.

Counsel fees—Reference at trial.]—See ARBITRATION, 6.

Lien for Costs.]—See ATTACHMENT OF DEBTS, 2—SETTING OFF JUDGMENTS.

See also, PRODUCTION OF DOCUMENTS, 1—SECURITY OF COSTS, 2.

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AUCTIONEER.

See INTERPLEADER, 2.

BALLOT PAPERS.

See MUNICIPAL LAW, 5.

BILLS AND NOTES.

Renewal—Statute of Limitations.]—Action on a promissory note. Plea, no consideration, as it was given in renewal of another note in which plaintiff's remedy was barred by the Statute of Limitations.

Held, that such a plea constituted no defence.—*Wright v. Wright*, 295.

BILLS OF COMPLAINT.

Alterations and additions to—See AMENDMENT.

Dismissing for want of prosecution.]—*See DISMISSING BILL FOR WANT OF PROSECUTION.*

CERTIORARI.

See DIVISION COURTS.

CHAMBERS (CHANCERY).

Jurisdiction.]—*See REFEREE IN CHAMBERS.*

COMMISSION TO EXAMINE WITNESSES.

1. *In Quebec.*]—C. S. C. c. 79, sec. 4, which authorizes the issue of a subpoena to the Province of Quebec requiring the attendance of a witness for examination in this Province does not deprive a party of the right to have witnesses in Quebec examined by commission.—*Stratford v. Great Western Railway Co.*, 91; *McIntyre v. Fair*, 110.

2. *On return of a motion.*]—A commission for the examination of a party to the cause on his own application will not be granted unless it is clearly shewn that the commission would under the circumstance be conducive to the ends of justice.—*Price v. Bailey*, 256.

COMPENSATION.

See VENDOR AND PURCHASER, 12.

COMPUTATION OF TIME.

1. 34 Vict. c. 12, sec. 12, O.—*Notice of trial—Ejectionment.*]—*Held*, that the “two clear additional days to the time now allowed by law” for service on the agent of a country attorney, under the above statute, means the insertion of two days between the day of service and the day of the happening of the event to which the notice relates. A service of notice of trial on the Toronto agent of a country attorney on Saturday for Monday week would be sufficient.—*Nordheimer v. Shaw*, 14.

2. *Con. Orders 273 & 406.*]—Replication was

filed on the 9th of October. The sittings of the Court were held on the 30th. *Held*, that replication was filed “three weeks before the commencement of the sittings.”—*Wilson v. Black*, 130.

CONSOLIDATION OF ACTIONS.

Irregularity—Motion for leave to appeal.]—By a decree made in *DeBlaquiere v. Armstrong* it was ordered that that suit be consolidated with the suit of *Armstrong v. Deedes*. One of the parties had a different solicitor in each suit.

Held, that subsequent proceedings must be carried on in *DeBlaquiere v. Armstrong*, the suit in which the decree was made, and that the solicitor in that suit was the proper solicitor to be served with notice of further proceedings, and not the solicitor in the suit of *Armstrong v. Deedes*, the consolidation being held to operate as a stay of proceedings in that suit.—*DeBlaquiere v. Armstrong—Armstrong v. Deedes*, 122.

See ADMINISTRATION ORDER.

CONTEMPT.

See ATTACHMENT—PRODUCTION OF DOCUMENTS, 11, 15.

CONVICTION.

See CRIMINAL LAW.

CORPORATION.

Misnomer of.]—Defendants, a company, were styled in the bill “The Ontario Wood Pavement Co.” Certain other defendants alleged to be directors of this company, when brought up to be examined for discovery, denied all connection with it, and refused to answer any question relating to “The Ontario Wood Pavement Co. of Toronto.” This latter name the plaintiff's solicitor stated to be the true corporate name of the company intended to be described by the bill; but there being no further evidence of this fact, an application to compel the defendants to answer the questions put to them was refused.—*Dickey v. Ontario Wood Pavement Co.*, 93.

Obtaining discovery from]—*See PRODUCTION OF DOCUMENTS*, 3.

COSTS.

1. *Payment—Reasonable time.*]—The plaintiff taxed costs on an order on the 10th May. These costs were revised in Toronto on the 22nd May, and on the same afternoon were demanded of defendant's attorney in Toronto, the defendant himself living in Belleville. On the 23rd May the order for costs was made a rule of Court.

Held, that the rule was regular.—*Smith v. Cronk*, 80.

2. *Demurrer books.*]—After issue joined in demurrer, but a month before term, plaintiff prepared demurrer books. The case was subsequently referred to arbitration. Costs of the pleadings, &c., to be costs in the cause.

Held, that the preparation by the plaintiff of the demurrer books was reasonable, and that he

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must be allowed costs of the same on taxation as part of the necessary proceedings in the cause before the reference.—*Elliott v. Northern Assurance Co.*, 111.

3. *New trial on payment of costs.*]—*Held*, that the costs of a chamber application to stay proceedings until term in a Superior Court case tried at the County Court under the Law Reform Act of 1868, are taxable under a rule for a new trial upon payments of costs, the County Court Judge having refused to stay the proceedings.—*MERCHANTS' BANK v. Ross*, 215.

4. *Revision of taxation—Case settled.*]—The bill of costs of this cause having been taxed by the local Master, the plaintiff paid the amount taxed without protest.

Held, that he still was entitled to a revision of taxation before the Master at Toronto.—*Korman v. Tookey*, 112.

5. *Appeal—Decree subsequently reversed.*]—The Court of Error and Appeal reversed an order of the Court of Chancery and directed a petition to be dismissed with costs.

Held, that this did not entitle the appellants to costs of proceedings in the Court below, subsequent to the order which was reversed.—*Re Goodhue*, 87.

6. *To follow the event—Further directions.*]—The rule of the Court now is, that costs should follow the event, unless very special circumstances are shewn.

As to what evidence may on a question of costs be used on further directions.—*Downey v. Roaf*, 89.

7. *Revision of bills taxed by local Masters—Evidence.*]—The taxing officer on revision of bills of costs taxed by a local Master has power under Gen. Orders 311 and 312 not only to strike out items improperly allowed but also to restore items improperly struck out, and generally to review the taxation.

Evidence cannot be received by a taxing officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction.—*Keim v. Yeagley*, 60.

Costs of the day.]—See STAYING PROCEEDINGS, 1.

Counsel fees.]—See ARBITRATION AND AWARD, 6—ATTORNEY AND SOLICITOR, 12.

Taxation.]—See ATTORNEY AND SOLICITOR, 9, 10, 11.

Of unnecessary proceedings.]—See MASTER'S REPORT.

See also PRO CONFESSO ORDER—SECURITY FOR COSTS.

COUNTERMAND.

See NOTICE OF TRIAL, 4.

COUNTY COURT.

1. *A. J. Act, secs. 59, 64.*]—*Held*, that under

secs. 59 and 64 of the Administration of Justice Act of 1873, there should be no County Court Sitting in May of that year.—*Dain v. Gossage*, 103.

2. *Jurisdiction—Payment—Set-off.*]—The plaintiff in a County Court suit gave credit on a claim of \$300 (for board, &c.) for \$170, being the value of an article received by him from defendant.

Held, that although the agreement as to setting off the one against the other be made before the debt for which the action is brought is contracted, yet, if the amount to be allowed to defendant for the article can be treated as a payment of a portion of the plaintiff's claim, and not merely an unliquidated set off against it, or the transaction can be viewed as a sale first of the article upon an agreement that payment of it was to be made in board, &c., to be furnished by plaintiff to defendant—the Court has jurisdiction.—*Fleming v. Livingston*, 63.

3. *Payment or set-off.*]—The Judge of a County Court has the right at the trial of a case where the jurisdiction of the Court is denied, to enquire into the facts, so as to ascertain whether or not there be jurisdiction: e. g., to enquire whether there has been a settlement of accounts between the parties. Until such enquiry has been made, prohibition cannot be granted.—*In re Dixon and Snarr*, 336.

4. *C. L. P. Act, secs. 109, 129—34 Vict. c. 12, sec. 4—County Judge.*]—*Held*, that a County Judge has only power under above Acts to impose terms when the party applies for an indulgence, and does not give power to make any substantive or unconditional order as to terms.—*Tecumseth Salt Co. v. Platt*, 251.

COUNTY COURT JUDGE.

Jurisdiction.]—See COUNTY COURT, 4.

Reference to—Fees.]—See ARBITRATION, 6.

CRIMINAL LAW.

1. *Conviction for being drunk on public street.*]—A person was convicted of being drunk on a public street, contrary to law, and adjudged to pay a fine of \$50 and costs, or to be imprisoned for six months at hard labour. There was a power given by by-law 478 of the City of Toronto to imprison an offender for the above offence, but in the warrant of commitment no reference whatever was made to the by-law.

Held, that as there is no common law right to imprison any one for being drunk on a public street, and the by-law not having been referred to, the conviction was bad.—*In re Livingstone*, 17.

2. *Person drunk, but not disorderly—Commitment without prior distress—36 Vict. c. 48, sec. 315.*]—*Held*, that under 36 Vict. c. 48, sec. 315, where a person is ordered to pay a fine, or in default to be imprisoned, a distress must issue for the fine and be returned unsatisfied before he can be imprisoned.

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A person cannot legally be arrested for drunkenness in his own house, even at the request of his own family, unless he is creating a disturbance of the peace.—*Regina v. Blakeley*, 244.

3. Setting aside conviction—Variance between it and warrant of commitment.]—On a motion to set aside a conviction and warrant of commitment on the grounds : (1) that the conviction was not in the magistrate's office, but in that of the Clerk of the Peace ; (2) that the conviction did not contain a clause of distress; and (3) that the conviction only warranted the imprisonment without hard labour, whereas the prisoner had been committed with hard labour.

Held, that the prisoner must be discharged, but on the last ground only.—*Regina v. Yeomans*, 66.

See EXTRADITION.

CRIMINAL PROSECUTION.

Civil action for expenses of.]—See ACTION.

CROSS-EXAMINATION ON AFFIDAVITS.

1. English practice.]—The rule in force in England (Dan. Pr. 810) that a party who has made an affidavit must submit to cross-examination upon it, if required, on notice to his solicitor, before taking any further steps in the cause, being founded on a special English order, has no application in this Province.—*Grant v. Winchester*, 44.

2. Affidavits in reply.]—Cross-examination upon affidavits in reply permitted.—*Re Foster*, 95.

See PRODUCTION OF DOCUMENTS, 12.

CUSTOM.

Evidence of mercantile custom.]—To incorporate mercantile usages with the terms of a contract, or to prove that they form the basis of it, they must be such as attach universally to the subject matter of the contract in the neighbourhood or place where it was made.

If a local custom or usage of a particular place, or class of persons, be relied on, it must be shewn that the parties knew the custom, as it is not binding on those who are ignorant of it. The evidence of the usage must be “clear, cogent, and irresistible.”—*Burke v. Blake*, 260.

DECLARATION.

Abbreviation.]—Held, that the use of the abbreviation “A.D.” instead of the words “in the year of our Lord,” in the dating of a declaration, is not sufficient grounds for setting it aside.—*Smith v. Thompson*, 109.

Variance in copy filed and served.]—See NOTICE OF TRIAL.

DECREE NISI.

Effect of proceeding under.]—Proceedings

under a decree which is not absolute are invalid. The purchaser at a sale under such a decree was refused a vesting order, though he offered to waive all objections to the proceedings, it being considered that it was only the defendants who could waive this objection.—*Clarris v. Ellis*, 115.

DELIVERY OF POSSESSION.

Con. Orders 389, 464.]—After sale under a decree, an order for delivery of possession, will not, as a general rule, be made against a person not a party to the suit ; and, *quere*, if there be any jurisdiction over strangers except in the plain case of parties taking possession, *pendente lite*, without any pretence of paramount title.—*Trust and Loan Co. v. Start*, 90.

DEPOSITIONS.

Transmission of.]—See EVIDENCE.

As evidence.]—See TAVERN LICENSES.

DISCOVERY.

See PRODUCTION OF DOCUMENTS.

DISMISSING BILL FOR WANT OF PROSECUTION.

1. Compromise of suit.]—A compromise of a suit having been entered into before answer, the defendant may set up the compromise in his answer, and pray, by way of cross-relief, that it be specifically performed ; and if the plaintiff does not diligently proceed with the suit, the defendant is enabled to move to dismiss for want of prosecution.—*Small v. Union Permanent Building Society*, 206.

2. Excuse for delay.]—The pendency of another suit, which would give the relief desired, but in which no decree has been obtained, is not a sufficient answer to a motion to dismiss for want of prosecution.—*Bain v. McConnell*, 113.

3. Semble, If the time when the plaintiff should join issue is not three weeks before the next hearing term at the place where the venue is laid, the defendant cannot succeed on a motion to dismiss, founded on the plaintiff omitting to set the cause down for hearing at that term.

Delay on the part of the defendant in making production is no excuse for the non-prosecution of the suit by the plaintiff, where the plaintiff has delayed taking steps to compel production.—*Wilson v. Black*, 130.

4. The prosecution of a suit was, upon the advice of counsel, delayed, pending an appeal to the Privy Council in a suit previously instituted, upon the result of which appeal the second suit depended.

Held, on a motion to dismiss for want of prosecution, that under the peculiar circumstances of the case the excuse for not proceeding with the suit was sufficient.—*Lindsay Petroleum Co. v. Pardee*, 140.

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5. Where the proceedings in the suit have been conducted in a loose manner on both sides, without regard to the strict practice of the Court.

Held, that delay on the part of the defendant, and acquiescence by him in delay on the part of the plaintiff, rendered it inequitable to allow the defendant suddenly to determine the dilatory method of conducting the suit and insist upon a strict compliance by the plaintiff with the practice of the Court: and a motion to dismiss was therefore refused.—*Waters v. Burrill*, 269.

6. Where the time for filing replication expires less than three weeks before the commencement of the sittings at the place where the venue is laid, the defendant cannot succeed on a motion to dismiss for not proceeding to a hearing at the sittings.—*Richardson v. Bilton*, 280.

7. *Restoring dismissed bill.*]—A bill dismissed for want of prosecution will not be restored unless it can be shewn that the plaintiff's cause of suit will be lost by the dismissal.

Where an order directed that a better affidavit on production should be filed by the plaintiff within six weeks, and in default that the bill be dismissed,

Held, that upon default being made, an *ex parte* motion to dismiss was regular; notwithstanding that on the motion the fact was not disclosed that the hearing had, by consent, been postponed because the sittings for which the cause was set down were to be held before the expiration of the six weeks.—*Dunn v. McLean*, 156.

8. *Terms—Costs.*]—Upon a motion to dismiss where the only complaint is that the replication has not been filed within the time limited for so doing, and no sitting of the Court has been lost, the plaintiff may be put on terms to go down to a hearing at the next sittings at the place where the venue is laid, but the defendant will not be awarded costs of the application, unless he has, by letter or otherwise, required the plaintiff's solicitor to proceed and file replication, and the latter has neglected to do so.—*McGillivray v. McConkey*, 114.

Petitions in insurance cases.]—See PETITIONS.

Insolvency of sole plaintiff—Abatement.]—See ABATEMENT.

DISPUTING NOTE.

Statute of limitations, how set up as a defence to a foreclosure suit—Mistake of solicitor—Chambers.]—An application was made to vacate a preceipe decree taken into the Master's office, and to allow instead of a disputing note, an answer to be filed setting up the Statute of Limitations. The application was held to be properly made in Chambers, and was granted, it being shewn that the note was filed through the mistake of a solicitor in supposing that the defence of the statute was available under it.

Under a note disputing the amount of the plaintiff's claim, filed in a mortgage suit, questions as to the correctness of the amount alone can be entered into.

The Statute of Limitations cannot be set up as a defence in this way, but must be pleaded.—*Cattanach v. Urquhart*, 28.

DISTRESS.

See RECEIVER.

DIVISION COURTS.

1. *Prohibition—Appearance and defence in Court below.*]—*Held*, that a party not raising the question of jurisdiction on the trial of a case in the Division Court, is not prohibited from raising the question upon the second trial, a new trial having been granted.—*Deadman v. Agricultural and Arts Association*, 176.

2. *Jurisdiction—Splitting cause of action—Unsettled account over \$200, but under \$400—39 Vict. c. 15, sec. 2—Abandoning excess—Statute affecting suits commenced before its passing, but tried after.*]—The plaintiff, in a suit in a Division Court brought before the passing of 39 Vict. c. 15, sued for \$30 due as a balance of an account for board for self and horse, which appeared at the trial to be a balance of an unsettled account exceeding \$200. He also sued for \$82 for board for self and horse for a subsequent period, and abandoned the excess of \$12 over \$100. On objection being taken to the jurisdiction of the Division Court, the Judge allowed an amendment. The plaintiff then altered his claim, reducing it to the \$82 only, and the case was again tried and judgment reserved, whereupon application was made for prohibition.

Held, that the Division Court had no jurisdiction independently of the 39 Vict. c. 15, sec. 2, which gives jurisdiction in cases of unsettled accounts over \$400; but that under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was therefore no necessity for any amendment. A plaintiff, to give a Division Court jurisdiction where his claim is in excess, must abandon the excess in his claim, and cannot wait until the hearing, and then do it.—*In re McKenzie and Ryan*, 323.

3. *Service of summons out of jurisdiction—Residence—C. S. U. C. 10, secs. 70, 79.*]—*Held*, that there is nothing in the Division Courts Act to prevent a bailiff serving a summons out of the jurisdiction, though he is not obliged to do so. It is immaterial that a defendant is without the jurisdiction at the time he is served, if at such time he is in law a resident within the jurisdiction.

The defendant worked at Aylmer, in the Province of Quebec, whilst his wife and family lived at Rochesterville, across the Ottawa, in the Province of Ontario, where his wife kept a store, and where defendant often came to see her.

Held, that his residence was with his family, and he was subject to be sued in the proper Division Court in the Province of Ontario.—*In re Ladouceur and Salter*, 305.

4. *Certiorari—Variance between declaration and claim.*]—A claim in a Division Court for \$40, for “detention of plaintiff by defendants on a journey from Toronto to Detroit and back

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(journey occurring between 28th November, when he started from Toronto, and 3rd December, when he got back), was removed by *certiorari* into the Queen's Bench, where declaration was on contract for \$500, for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar considering the want of technicality in Division Court pleadings.—*Hunter v. Grand Trunk R. W. Co.*, 67.

See PROHIBITION.

DOWER.

See MARRIED WOMAN, 4.

DRUNKENNESS.

See CRIMINAL LAW, 1, 2.

EJECTMENT.

1. *Married woman in possession.*]—Where a wife, living apart from her husband, is in possession of land, under such circumstances as precludes the presumption of her being agent for her husband, she must be made a defendant in ejectment for the land.—*Woodward v. Cummings*, 110.

2. *Notice limiting defence—Amendment.*]—When a defendant files his appearance the cause is at issue, and the plaintiff may serve issue book and notice of trial. Defendant may, however, within four days, give notice limiting his defence; and, if he do, may, under the powers of amendment in the Administration of Justice Act, have the issue book amended in accordance with the limitation, but he is not entitled to have the notice of trial set aside.—*Casey v. McGrath*, 274.

3. *Better particulars.*]—*Held*, that an order for better particulars of title may, in ejectment, be made before appearance is entered.—*Fralick v. Dormyn*, 101.

4. *Equitable pleadings.*]—*Held*, that there is no authority under 36 Vict. c. 8, secs. 4, 7, for carrying the pleadings in ejectment further than replication.—*Cascanne v. Chartrand*, 211.

Examination under A. J. Act.]—*See same*, 7.

Costs in—Judgment debtor—Examination of.]—*See JUDGMENT DEBTOR.*

Striking out defence for time.]—*See STRIKING OUT PLEA*, 3.

Security for costs in.]—*See same*, 3.

EVIDENCE.

1. *Transmission of depositions.*]—*Held*, that sec. 193 of C. L. P. Act permits the transmission of certified copies of depositions; an application to transmit the originals was therefore refused.—*Fagan v. Wilson*, 295.

2. *Examination of parties—Order 138—C. S. C. c. 79, sec. 4—Subpœna to another Province.*]—The term “witness,” in C. S. C. c. 79, sec. 4, includes parties to the cause, as well as witnesses in the ordinary sense of the word.

Examination of a defendant after answer under Order 138 is an examination of witnesses within this Act. Application for an order under sec. 4 of the Act is properly made to the Referee in Chambers.—*Maffatt v. Prentice*, 33.

Subpœnas to Quebec.]—*See SUBPŒNA.*

See also ARBITRATION AND AWARD, 3—*POSTAL CARD.*

EXAMINATIONS IN CHANCERY.

See CROSS-EXAMINATION ON AFFIDAVIT—EVIDENCE, 2—PRODUCTION OF DOCUMENTS, 12.

EXAMINATION OF JUDGMENT DEBTOR.

See JUDGMENT DEBTOR.

EXAMINATIONS UNDER A. J. ACT, 1873.

1. *Secs. 24, 29—Affidavit.*]—*Held*, that an affidavit by a managing clerk of attorney of party applying for an order to examine, is insufficient unless it states that he had some particular charge of the suit.—*Elmsley v. Cosgrave*, 164.

2. An affidavit for order to examine may be made by the partner of plaintiff's attorney.—*Lloyd v. Henderson*, 254.

3. *Sec. 24—Party residing abroad.*]—*Held*, that such an order may be granted, although such party resides beyond the jurisdiction of the Court.—*Morell v. Morrison*, 210.

4. *Sec. 24—“Officer” of Railway Co.*]—The plaintiff applied for an order to examine the chief engineer of the defendant.

Held, that the engineer was an officer of the company within the meaning of the sec. 24.—*Oakley v. Toronto, Grey & Bruce R. W. Co.*, 253.

5. The tie inspector of a railway company is not an “officer” of the company within this section.—*Dalziel v. Grand Trunk R. W. Co.*, 307.

6. *Sec. 24—Party to interpleader issue may be examined.*]—An application to examine the defendant in an interpleader issue was opposed on the ground that such a proceeding was not “an action at law.” Order made.—*Canada Permanent Building Society v. Forest*, 254.

7. *Sec. 24—Ejectment.*]—One of two defendants in an action of ejectment allowed judgment to go by default.

Held, that he was nevertheless liable to be examined.—*Bacon v. Campbell et al.*, 275.

8. *Sec. 24—Re-examination.*]—An *ex parte* order will not be granted for the re-examination of a party, and special circumstances must be shewn.—*Laird v. Stanley*, 322.

EXECUTION.

Payment of debt and costs after judgment—Reasonable time.]—A party who has to pay debt and costs on a final judgment on verdict, nonsuit, demurrer or otherwise, in the ordinary

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course of a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them; nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting a "reasonable time" for payment.—*Coolidge v. Bank of Montreal*, 73.

Death of Sheriff.]—See SHERIFF.

EXECUTORS.

Discharge of mortgage.]—Under 31 Vict. c. 20, sec. 62, O., that a mortgage may be validly discharged by one of several executors.—*Ex parte Johnson*, 225.

See ADMINISTRATION ORDER—REVIVOR.

EXTRADITION.

Certified copies of depositions—Opening railway switch to cause collision.]—In extradition cases the forms and technicalities with which the statute surrounds the production of affidavit evidence must be strictly complied with, and therefore, *Held*, that depositions taken in the United States cannot be read unless certified under the hand of the magistrate who issued the original warrant that they are copies of the depositions upon which such warrant issued, although attested by the party producing them to be such true copies; but, *semble*, the prisoner might be remanded to enable properly certified copies to be produced.

The prisoner was charged with assault with intent to commit murder, in that he had opened a railway switch with intent to cause a collision, causing a severe injury to a person on one of them.

Held, that this was not an "assault" within the statute.—*In re Lewis*, 236.

FILING PAPERS.

A paper mailed or delivered to a Deputy Registrar or other officer, elsewhere than at his office, to be filed, cannot be treated as a filing; but if he afterwards file the paper in his office, previous irregularities in its delivery to him are generally speaking cured.

When a pleading is filed in a Deputy Registrar's office in a County in which the solicitor for the opposite party does not reside, service of notice of filing must be effected according to Order 43. Service on the Toronto agent is irregular.

Notice of filing not having been served on the same day that the pleading was filed, is not a ground for moving to take the pleading off the files. The proper course is, to move to enlarge the time for taking the next step in the cause.—*Hayes v. Shier*, 41.

See SUMMONS AND ORDER.

FORECLOSURE.

Incumbrancers having neglected to prove claim

let in after foreclosure, under special circumstances.]—Incumbrancer, a company, duly notified in a creditor's suit to come in and prove their claim in the Master's Office under the decree, neglected to do so, relying upon a supposed remedy at law. They were accordingly foreclosed by the decree upon further directions, and subsequently an assignee of their claim, the legal remedy having proved illusory, applied to be allowed to prove the claim, notwithstanding the foreclosure and the lapse of more than two years. The application was granted, as it appeared that no other rights had intervened, that no other incumbrances would be prejudiced, and that the only opposition to the motion was on the part of the debtor.

The application, under the circumstances, was held to be properly made in Chambers; but that if the claim had been adjudicated upon on the merits, the motion should have been made in Court.—*Cameron v. Wolfe Island Company*, 91.

Notice to defendant in Master's Office where bill pro confesso.]—As a general rule, notice of the proceedings in the Master's Office should be served upon a mortgagor against whom the bill has been taken *pro confesso*, whenever the plaintiff proves a claim in addition to his bill.—*McCormick v. McCormick*, 208.

See MARRIED WOMAN, 4.

FRAUDULENT PREFERENCE.

See INSOLVENCY, 6.

GUARDIAN AD LITEM.

1. Nominee of plaintiff—Costs.]—A solicitor, upon the plaintiff's application, having been appointed guardian *ad litem* to the infant defendants, and being unable to recover his costs from the plaintiff or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund.—*McKay v. Harper*, 54.

2. Conflict of interest.]—A suit was brought for redemption of mortgaged property, and the mortgagee having died, his widow and infant heirs were the defendants. Upon an application for the appointment of a guardian *ad litem* to the infant defendants, a solicitor, nominated by the mother, was appointed guardian, it being considered that there could be no conflict of interest between the mother and her children.—*Horkins v. Harty*, 200.

HUSBAND AND WIFE.

See MARRIED WOMAN.

IMPROVEMENTS.

See SALE, 6.

INFANTS.

1. Custody of—Right of Father—Con. Stat. U. C. cap. 74, sec. 8.]—The Court of Chancery has not

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heretofore interfered, and Common Law Courts of will not, (subject to Con. Stat. U. C. cap. 74, sec. 8,) interfere to deprive the father of his exclusive common law right to the custody of his children, except in cases where it is essential to their welfare and well-being, either physically, intellectually, or morally, that they should so interfere. It is not sufficient for the mother, claiming children as against their father, to allege that he holds what she calls dangerous and fanatical religious views (in this case those of the "Swedenborgians.") Nor will a child even though within the year of nurture be delivered up to the mother under Con. Stat. U. C., sec. 8, unless she establishes such a case as would justify her in leaving her husband's home.—*In Re Carswell*, 240.

2. Custody of—Foreign parents—*Lex loci.*—The parents of the child were foreigners. They lived apart, and had brought cross actions for divorce in the U. S. Courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that by the law of the state of Michigan she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of twelve, subject, however to the right of the Court to interfere with and remove it for cause assigned. An *ex parte* order had been made in April, 1875, in the wife's divorce suit in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child.

Held, that the parents being foreigners, and the domicile of the child not having, under the circumstances, been changed, the law of the State of Michigan must govern; but that the order in favour of the wife being *ex parte*, and the foreign judgment not being conclusive (23 Vict., cap. 24), it was competent to consider the "cause assigned" by the father; so it was *held* (especially in view that the divorce suits would be tried in a few weeks' time, and so settle the merits of the case), that the mother having voluntarily given up the custody of the child to the father, she should not, under the present facts, have it re-delivered to her.—*In Re Kinney*, 245.

3. Custody of—Right of father—Religious education.—The father of the infant children (under twelve years of age) was a Protestant, and the mother a Roman Catholic. She left him, taking the children, alleging cruelty on his part, and they both made statements complaining of each other's conduct. The husband afterwards took the children from her, placed them in the care of a Presbyterian Minister (the respondent), and left the country, it was said, for a temporary purpose. On an application by the mother for the custody of the children, it was *held*, that she could not under the circumstances succeed against the father of the children; and therefore could not get an order against the respondent, his custody being that of the father.—*In Re Ross*, 285.

4. Application of property for maintenance—33 Vict. cap. 21 sec. 3 O., only authorizes the application of the interest on insurance moneys,

apportioned to infants under 29 Vict. cap. 17, for the maintenance of the infants. The principal can, under these acts, only be applied for advancement, but under the general jurisdiction of the Court may be applied for maintenance.—*Re Bazeley*, 316.

5. Conversion.]—The principle of sec. 56 of C. S. U. C. c. 12, relating to the conversion of infants' estate sold under that Act, is also applicable to all cases where it is necessary for collateral purposes to effect a conversion of an infant's estate from realty into personality; the rule of the court in all such cases being, that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin and heirs-at-law of the infant are concerned.—*Fitzpatrick v. Fitzpatrick*, 134.

6. Sale of infant's estate.]—On an application for sale under C. S. U. C. c. 12, sec. 50, the examination of the infant by the Master must be annexed to the petition. A certificate from the Master that they have been examined and consent is insufficient.—*Re Alford*, 192.

7. The Court may, under C. S. U. C. c. 12, sec. 50, order a sale of infants' estate to satisfy claims of the deceased father of the infants, if it deems that course to be for the benefit of the infants.—*Re Barker*, 225.

8. An application to confirm a sale of an infant's estate was refused where it was not shewn as required by C. S. U. C. c. 12, sec. 50, that the sale was necessary for the maintenance of the infant, or that by reason of the property being exposed to waste or delapidation, or to depreciation from any other cause, the interests of the infant would be promoted by a sale, and where also it appeared that the proceeds of the sale would not produce as large a sum as the property could be rented for, if placed in a proper state of repair.—*Re Phelan*, 259.

9. A testator by his will devised his property to his wife for life, and after her death to be divided equally amongst his children. The will further provided that the division should not take place until the youngest child attained the age of twenty-one years.

An application being made when the youngest child was only seven years old, for a sale of a portion of the land in order to pay off a mortgage on the whole.

Held, that an order for sale would be against the provisions of the will, and therefore in violation of sec. 51 of C. S. U. C. c. 12.—*Re Smith*, 282.

See PARTITION, 2.

INSOLVENCY.

1. Insolvent Acts, 1864, 1869—Procedure under.]—*Held*, that the Act of 1869 regulates the procedure, after its passage, in insolvency proceedings commenced under the Act of 1864, and, consequently, that the discharge of an insolvent who had made an assignment under

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the Act of 1864, entitled "The Insolvent Act, 1869," was valid.—*Carnegie v. Tuer*, 165.

2. Discharge of—Setting aside ca. sa.—A barber not a "trader"—No assets—Intention to defraud.]—Held, that a barber is not a trader within the Insolvent Act, 1869.

Held, also, that an assignment made by a person with no assets for the assignment to take effect upon, and for the purpose of defeating a creditor who was at the time suing such person, is fraudulent, and a discharge in such insolvency proceedings is void.

Semble, a voluntary assignment without assets is void.—*Thomas v. Hall*, 172.

3. Act of 1875, secs. 9, 14, 18—Description of parties—Entitling affidavits—Setting aside attachment.]—*Semble*, that the omission to describe the parties in the entitling of an affidavit under the above enactment is not a fatal objection if the description appears in the body of the affidavit.

Held, (1) That the omission to state in the creditor's affidavit, under sec. 9, that the defendant owed him not less than \$200 "over and above the value of any security which he holds for the same," is a fatal defect. This statement is part of the creditor's case.

(2) A debtor, when applying under sec. 18 for relief from attachment proceedings against him, can except to the creditor's case on the face of it, as well as shew by contra evidence that it is not maintainable,

(3) And if he can shew that the writ never should have been issued, he is entitled, not only to have the attachment made under a writ set aside, but also the writ itself, in like manner as a creditor is entitled under sec. 14.—*McDonald v. Cleland*, 289.

4. Appeal from County Judge.]—Under secs. 83, 84, of Insolvent Act of 1869, the application in appeal must be served upon respondent, and security for costs given within five days from the day on which judgment is rendered. It is not enough to serve notice and file bond.—*In re Thomas*, 252.

5. Act of 1869, sec. 134—Appeal—Death of insolvent.]—When an insolvent, who has appealed from the decision of a County Judge refusing to set aside an attachment against him, dies during the pendency of this appeal, and no personal representative has been appointed, the appeal fails.—*Laurie et al. v. McMahon*, 9.

6. Act of 1875, secs. 125, 158, 130, 133—Appeal—Fraudulent preference.]—Appeal under section 129 of Insolvent Act of 1875 from decision of County Judge.

On the 11th September, Martha Hurst, and Edward Hurst, her husband, made a chattel mortgage to the Dominion Bank to secure a previous indebtedness of Richard Hurst to the Bank. No future day was named for the payment, and the proviso to hold possession till default was struck out. A writ of attachment in insolvency was issued against Richard Hurst on the 4th October, 1875, and the assignee took possession of the mortgaged chattels then in the debtor's possession. The Bank claimed the

chattels under the mortgage, which the assignee contended was void as against the creditors. The Bank thereupon petitioned for an order directing the assignee to give up the goods. It appeared also that the debtor had long previously been embarrassed; that most of his paper was under protest; that his real estate was also mortgaged to the Bank and others, and no pressure was shown to obtain the mortgage, and no promise was made of any future advance. The Judge declined to grant the order petitioned for, holding the mortgage void under sections 130, 133.

Held, under these circumstances, after an elaborate review of the English and Canadian authorities bearing on the subject, that the chattel mortgage was fraudulent and void as against creditors, and the appeal was dismissed with costs.—*In re Hurst*, 329.

Guardian—Goods in custody of the law—Replevin.]—See REPLEVIN.

Security for costs on setting aside attachment.]—See SECURITY FOR COSTS, 5.

Of sole plaintiff.]—See ABATEMENT.

Effect on partnership.]—See ARBITRATION, 2.

INSURANCE.

Declaration on policy.]—Held, that in an action on a policy of insurance it is not incorrect to set out all the conditions which, together with the body of the policy, form the contract between the parties.

Semble, that a declaration without them would be bad.—*Fair v. The Canadian Mutual Fire Ins. Co.*, 255.

INTEREST.

See VENDOR AND PURCHASER, 7—WRIT OF SUMMONS, 1.

INTERPLEADER.

1. Jurisdiction — Prohibition — Waiver.]—Where a Judge makes an order, which, though possibly erroneous in itself, is made at the request of one of the parties and is acted upon, a prohibition at the request of such party will be refused.—*Richardson v. Shaw*, 296.

2. Parties acting under judicial authority.]—An interpleader order was granted in this case in favour of an auctioneer, who had sold goods for the mortgagee of the owner, but had, in obedience to a Judge's order, paid over the proceeds to an assignee of the owner, subsequently appointed in insolvency proceedings.—*Watson v. Henderson et al.*, 299.

See EXAMINATION UNDER A. J. ACT, 4.

INVESTMENT.

Of funds in Court—C. S. U. C. c. 12, sec. 72.]—*Prima facie* money in Court should be inves-

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ted in the public funds; but the Court has, under C. S. U. C. c. 12, sec. 72, a discretion to authorize investments on mortgages of real estate.—*Re Cronan—Farrell v. Scanlon*, 221.

IRREGULARITY.

See LACHES.

ISSUE.

Notice of trial before issue.]—Held, following *Ginger v Pycroft*, 5 D. & L. 554, that a notice of trial given before issue joined, except under Reg. Gen. 36, is irregular; the issue book must be delivered before or with the notice of trial.—*Ross v. McLay*, 14.

JOINT STOCK COMPANY.

1. *Transfer of shares—Power of directors to refuse to register.]—Held*, that a company incorporated under the provisions of 27 & 28 Vict. c. 23, has not power to refuse to allow a transfer of shares of its stock without assigning a sufficient reason therefor.—*In re Smith and The Canadian Car Co.*, 107.

2. This was an application by the transferee of certain shares in a joint stock company, for a mandamus to compel the directors to enter such transfer in the books of the company, so as to perfect the transfer. A by-law of the company provided that "any shareholder may, by leave of the directors but not otherwise, transfer his share or shares, by making an entry of such transfer in a book, &c. The directors declined to grant the required leave, but gave no reasons.

Held, that it was competent for the directors to exercise their discretion without giving reasons; and having exercised this discretion, without evidence of caprice, the application could not succeed.—*In re Macdonald and The Mail Printing and Publishing Co.*, 309.

JUDGE IN CHAMBERS.

A judge in chambers has power to set aside on the merits a final judgment signed on default of plea.—*Escott v. Escott*, 10.

See REFEREE IN CHAMBERS.

JUDGMENT DEBTOR.

1. *Examination of—Order for payment of costs a judgment.—An order had been obtained directing a defendant, Mrs. G., to pay to the plaintiff certain costs.*

Held, that the order was a judgment, and the defendant a judgment debtor, within the meaning of C. S. U. C. c. 24, sec. 41, as extended by 27-28 Vict. c. 25, and an examination of the defendant touching her ability to pay the costs was allowed.—*Lovell v. Gibson*, 132.

2. *Examination of—Application to commit.]—When a debtor has been examined under C. S. U. C. c. 24, sec. 41, an order for his attachment will be granted,—1. If he has given unsatis-*

factory answers; 2. If it appears that he has made away with his property in order to defeat or defraud his creditors.

Held, (1.) That proceedings under this Act being of a penal nature, a clear offence under the Act must be shewn to warrant an order for attachment.

(2.) That the debtor must have contumaciously refused to answer, or so equivocated as to render his answer no answer at all, before he can be said to have given "unsatisfactory" answers.—*Lemon v. Lemon*, 184.

3. The judgment was against a husband and his wife. They were examined as to their estate and effects under the above statute. It appeared, from the wife's statement, that she had at one time mortgages, which, if still held by her, would have been applicable to the satisfaction of the judgment. She had not now the means of satisfying the judgment, the reason of her inability being that she gave to her husband the mortgages, and proceeds of mortgages which she owned, to enable him, as she said, to enter into business, or for some other purpose. The husband refused to answer the question as to who bought the mortgages, or whether he negotiated the sale of the mortgages. He admitted that he lately had money in his possession to a considerable amount: may have had over \$1,000, but could not tell if he had \$2,000, or how much he had: could not say when he got the money. He gave some of the money, he could not say how much, to another person, but kept no account of it; the rest of it he could give no information about.

Held, that the husband had not made satisfactory answers respecting property which was liable, as his property, to satisfy the judgment. An order was accordingly made to commit him to the common gaol of the county for three months.

The law on this subject fully discussed, and the authorities fully reviewed.—*Schneider v. Agnew et al.* 338.

4. *Examination of—Ejection—Costs.]—An order will not be made under C. S. U. C. c. 24, sec. 41, as amended by 27, 28 Vic., c. 25, for the examination of a defendant in ejection against whom there has been a judgment for costs.—Walker v. Fairbairn*, 251.

JURISDICTION.

See COUNTY COURT—DIVISION COURT—JUDGE IN CHAMBERS—REFEREE IN CHAMBERS.

JURY TRIAL.

A. J. Act, 1873, cap. 8, sec. 18—Action for negligence.]—Order made to send a case for trial by a jury under 36 Vict. cap. 8, sec. 18, in an action against a railway company for negligence in killing horses by a train at a road crossing.—McGunnighal v. Grand Trunk R. W. Co., 209.

LACHES.

Irregularity—Setting aside declaration.]—Held,

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that a party applying to set aside a declaration for irregularity on the last day for pleading, has lost his right by his own laches.—*McNabb v. Inglis*, 209.

LANDLORD AND TENANT.

Distress for rent.]—See RECEIVER.

LAW REFORM ACT.

Expediting clause—Amendment.]—*Held*, in a case proper to be brought down to the County Court by the Law Reform Act of 1868, and where the entry under Form A is omitted from the issue book, but notice of trial is for the County Court, that the omission is not properly a ground for setting aside the issue book and notice of trial, but that the plaintiff will be allowed to amend on payment of costs.—*McDermott v. Elliot*, 107

LIS PENDENS.

1. *Alimony.*]—A certificate of *lis pendens* should not be issued in a suit brought for alimony only.—*White v. White*, 208.

2. *Vacating—Class suit.*]—In a class suit, in which a decree has been made, although the plaintiff's claim has been paid, the bill will not be dismissed nor a *lis pendens* vacated, where other persons may be entitled to the benefit of the decree, and to retain the *lis pendens*.—*Arnberry v. Thornton*, 190.

LUNATIC.

A person whom it was sought to have declared a lunatic was shewn to be in a state of mind described as “semile imbecility.”

Held, that he might properly be declared a lunatic under C. S. U. C. ch. 12, secs. 31, 32 and 33.—*Re Kelly*, 220.

MALICIOUS PROSECUTION.

See TRESPASS.

MANDAMUS.

See JOINT STOCK COMPANY.

MARRIED WOMAN.

1. *Ejectment—“Separate tort.”*]—Under the Married Woman's Property Act, 1872, a wife may be the sole defendant in an ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the Province.—*Warren v. Cotterell*, 11.

2. *Prochein amy.*]—The disabilities of a married woman are not removed by recent legislation to such an extent as to enable her to act as *prochein amy*.—*Giles v. Benjamin*, 70.

3. *Wife's separate estate—Pleading.*]—Action against a married woman on a promissory note.

Plea, coverture. Replication, that the note was made with respect to property which was defendant's separate property, within the meaning of 36 Vict. c. 16, sec. 9. There was also a replication on equitable grounds that the defendant had separate estate.

Held, that the first replication must be struck out as unnecessary and embarrassing.—*Quebec Bank v. Howe*, 347.

4. *Dower—Separate answer—Parties to a foreclosure suit.*]—A married woman is not in respect of dower a necessary party to a bill for the foreclosure of a mortgage in which she has joined to bar dower.

On an application, however, for a married woman so made a party to answer separately an order will be granted, but the plaintiff will take it at the risk of having the costs of making her a party afterwards disallowed.—*Davidson v. Boyes*, 27.

5. *Next friend—Security for costs—Staying proceedings*—35 Vict. c. 16, sec. 9—29-30 Vict. c. 42, sec. 1.]—A married woman brought a suit in her own name for redemption of lands, in which she claimed an estate for life under a lease made in 1866. *Held*, not her separate property so as to enable her to sue without a next friend under 35 Vict. c. 16, sec. 9.

A former suit in respect of the same subject matter in which the bill has been dismissed with costs to be paid by the next friend of the plaintiff, was considered as substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of such second suit.

A stay of proceedings until the costs of the former suit were paid, was refused, there being a distinction in this respect between suits by married women and suits by persons *sui juris*.—*Redman v. Brownscombe*, 84.

6. 36 Vict. c. 18, sec. 4—*Jurisdiction of Referee.*]—Applications under 36 Vict. c. 18, sec. 4, O., for orders allowing married women to execute conveyances without their husbands' being also parties, should be made to a Judge in Chambers, not to the Referee.—*Re Nolan*, 115.

7. *Separate answer—Con. Orders 94, 95, and 96.*]—The case of service of a bill upon a married woman, after an order has been obtained directing her to answer the bill separately from her husband, is not within Orders 94, 95, and 96, which require a bill to be served within a certain time from its filing.—*Dewar v. Folly*, 135.

8. *Contempt—Liability to attachment*—35 Vict. 16, sec. 9, O.]—A married woman, a defendant, living with her husband, was ordered as administratrix of a former husband to bring certain accounts into the Master's office in a suit in which her present husband was joined as co-defendant.

On application to commit her for disobedience of the order, it was contended that the rule laid down in *Maughan v. Wilkes*, 1 Chy. Chamb. 91, that the husband must answer for his wife's default unless he shews some ground of exemp-

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tion was in effect abrogated by 35 Vict. c. 16, O., which renders married woman liable for their separate engagements in certain cases.

Held, that sec. 8 of this Act not being applicable to the present case, in which the marriage took place before the passing of the Act, the other sections did not alter the above rule.

It being shewn that the married woman was a woman of great force of character, and not *in fact* under the control of her husband,

Held, that this was an insufficient reason for exempting the husband from attachment. To be discharged from this liability he must satisfy the Court that he has used his best endeavours to get his wife to obey the order.—*Murcheson v. Donohoe*, 138.

See EJECTMENT, 1—PRODUCTION OF DOCUMENTS, 10—QUIETING TITLES' ACT, 2.

MASTER IN CHANCERY.

See ATTACHMENT, 1—MASTER'S REPORT—REFERENCE TO MASTER.

MASTER'S REPORT.

1. *Leave to appeal—Costs.*]—On an application for leave to appeal from a report notwithstanding its confirmation, it is only necessary to shew: (1) that the delay is excusable; and (2) that there are reasonable *prima facie* grounds of appeal.

Costs of evidence unnecessary for these purposes will be disallowed.—*Nash v. Glover*, 267.

2. *Leave to appeal—Delay.*]—Although a party may appeal from the Master's report at any time after it is signed, he cannot be considered guilty of laches in proceeding to appeal until the expiration of the time within which he may appeal as of right, viz., fourteen days after the filing of the report.

Leave granted to appeal after the expiration of the fourteen days, it being considered that the delay in appealing was sufficiently accounted for, and that a *prima facie* ground of appeal was shewn.—*Caisse v. Burnham*, 201.

3. *Grounds of appeal.*]—In an order made on appeal from a Master's report the grounds of appeal should be recited.—*Downey v. Roaf*, 89.

MORTGAGE.

Sale under prior mortgage—Effect of purchase by mortgagor on rights of subsequent mortgagee.]—V. having mortgaged certain lands to G., subsequently sold his equity of redemption in a portion of the lands to B., from whom he took a mortgage, which he assigned to the plaintiff. G. subsequently sold the whole of the lands under a power of sale in his mortgage, and B. became the purchaser.

Held, that B.'s purchase under the power of sale in the first mortgage did not cut out, but enured to the benefit of V., the second mortgagee.—*Box v. Bridgman*, 234.

Discharge of.]—See EXECUTORS.

MUNICIPAL LAW.

1. *Qualification of councillor—Incumbrances.*]—*Held*, that notwithstanding the use of the word "estate," in the declaration of a candidate under the Consolidated Municipal Act, 1873, he is, nevertheless, qualified, if the rating of the value on the roll is sufficient in amount. No change has been made in the law that incumbrances are not to be considered in ascertaining the amount of qualification.—*Regina ex rel. Bole v. McLean*, 249.

2. *Qualification of councillor—Occupant.*]—A person having the mere possession of a lot vested in the Crown, determinable at any moment, has not such an estate in it as will qualify him under the Municipal Act; but it is, nevertheless, rightly assessed, under 32 Vict. c. 36, sec. 9, sub-sec. 2, O.

A lot was assessed thus:—"No. 25, H. B., Yeoman, &c.," under the head "name of taxable party," and then under the heading "name and address of the owner, where the party named in column 2 is not the owner," appeared the name of the respondent. His name was not bracketed with that of H. B., nor was it stated in any way to be a separate assessment. *Held*, that the roll shewed that the respondent was assessed for this lot and could qualify upon it.—*Regina ex rel. Lachford v. Frizell*, 12.

3. *Want of qualification—Acquiescence of relator.*]—An elector who, at a nomination meeting, acquiesces in a statement of fact by the returning officer, which, if true, would entitle the defendants to sit, and himself becomes a candidate on the strength of that statement, will not, when defeated at the polls, be heard, as a relator, to object that in fact the statement was incorrect, and that the defendants were therefore disentitled.—*Regina ex rel. Regis v. Cusac et al.*, 303.

4. *Leaving names of candidates off ballot papers—Acquiescence.*]—*Held*, (1) That the name of a candidate who has been nominated, but who withdraws (with the consent of the electors) before the close of a nomination, need not be placed upon the ballot paper. (2) The omission of the name of a candidate from the ballot paper is not *per se* a ground for setting aside an election, if it is not shewn that it has in some manner affected the result of the election.

The case of *Regina ex rel. Regis v. Cusac*, ante, followed, as to the result of acquiescence by a relator in irregular proceedings.—*Regina ex rel. Harris v Bradburn*, 308.

5. *A. J. Act, 1873. sec. 50—Amendment.*]—The relator failed to state that he was a candidate or a voter as required by 36 Vict. c. 48, sec. 131, but the fact that he was so, appeared in one of the affidavits.

Held, that as the fact of the relator being a voter was before the Court, an amendment of the relation was allowed under sec. 50 of the Administration of Justice Act, 1873.—*Regina ex rel. O'Reilly v. Charlton*, 254.

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NEW TRIAL.

Rescinding rule, for non-payment of costs.]—The defendant had obtained a rule a year previously for a new trial on payment of costs. He neglected to pay the costs and the plaintiff obtained a rule *nisi* to rescind the rule for a new trial. *Held*, that if the defendant should pay the costs of the trial, as provided by the original rule for new trial, and of this application within ten days, the rule *nisi* should be discharged, otherwise the rule for new trial should be rescinded.—*Pacaud v. McEwan*, 20.

On payment of costs.]—See COSTS, 3.

NOTICE OF ACTION.

A. J. Act, 1873—Amendment—Penal action.]—*Held*, that a defect in notice of action, required to be given by C. S. U. C., c. 126, sec. 10, could not be amended under secs. 49 and 50 of the Administration of Justice Act, 1873.—*McCrumb v. Foley*, 164.

NOTICE OF MOTION.

Neglect to attend on.]—As a general rule, where a person having received notice of a motion does not attend upon it, the order made thereon should not be interfered with.

But where a party who had so neglected to attend came in within twenty-four hours to re-open the matter, it was considered that he was entitled to be heard to shew that the order made was one which it was not proper to make.—*Price v. Bailey*, 256.

NOTICE OF TRIAL.

1. When necessary—Irrregular notice.]—A notice of trial is necessary to be given in a cause to be tried, however that cause may go down for trial, whether as a remanent, or put off from one assize to another by Judge's order, or taken down to trial by rule of Court or Judge's order.

A notice of trial signed by one of two partners of a firm of attorneys, though not by the partner who was the attorney for the plaintiff on the record, is not a nullity, but merely an irregularity which can be taken advantage of, if it is calculated to mislead.—*Macaulay v. Phillips*, 77.

2. Venue—Setting aside.]—*Held*, that the fact of a different county being inserted as the venue in the copy of declaration served, is no ground for setting aside notice of trial for the county inserted as the venue in the declaration filed.—*Brown v. Blackwell*, 165.

3. Amendment—A. J. Act, 1873.]—Notice of trial was given by mistake for the 11th January, instead of 10th January. The defendant did not appear to have been misled. *Held*, that the plaintiff might amend under A. J. Act, 1873.—*Meehan v. Walsh*, 294.

4. Countermand.]—*Semble*, it is not open to the plaintiff to countermand a notice of hearing once given.—*Richardson v. Bilton*, 280.

Before issue.]—See ISSUE.

Service of—See SERVICE OF PAPERS, 1, 2.

OPENING BIDDINGS.

1. Gen. Order 388—Special grounds.]—The Court is strongly disinclined to open biddings unless very special grounds are shewn.

The fact alone that a price can be obtained in advance upon that realized at the sale, does not constitute such a special ground.

An inadequate description of the property in the advertisement will be a sufficient ground, if calculated to mislead or deter the public from purchasing, but not otherwise. Objections of this kind amounting only to a complaint that all the advantages of the property have not been sufficiently dwelt upon in the advertisement should be taken upon the settling of the advertisement.—*Creswick v. Thompson*, 52.

2. After a sale under a decree or order, biddings will not be opened merely upon the offer of an advanced price, whether the purchaser at the sale is a stranger to the suit, or a party allowed by an order of the Court to bid.—*Mitchell v. Mitchell*, 232.

PARTICULARS OF CLAIM.

Particulars under common counts amended by striking out claim for wages not yet due, and inserting claim for wages up to issue of writ.—*Worden v. Date Patent Steel Co.*, 276.

See EJECTMENT, 3.

PARTIES.

Con. Order 57.]—The rule, that all parties interested in the subject matter of a suit must be before the Court, should only be relaxed under Con. Order 57, where the interests of justice manifestly require it.

A suit was brought to set aside a will, and the persons interested in the will, as well as those interested as next of kin or heirs-at-law in the event of the will being set aside, were made parties. Defendant, Mary Smelzer, one of the heirs-at-law, died subsequently to the institution of the suit.

Held, that the suit should be revived against the representatives of Mary Smelzer; and that although their interest was represented by other parties to the suit Con. Order 57 did not apply, as they might afterwards bring another suit to impeach the same will in case this suit failed, and no sufficient reason was given to justify the suit being proceeded with in their absence.—*Quantz v. Smelzer*, 228.

PARTITION.

Where allowed.]—The Partition Act of 1864 only applies to cases in which some common title in the petitioner and respondents, to the land in question, is admitted.—*Bennetto v. Bennetto*, 145.

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2. Infant's share.]—When lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty.—*Thompson v. McCaffrey*, 193.

PAYMENT INTO COURT.

1. Con. Gen. Order 352.]—Money ordered to be paid into Court must be paid into the Canadian Bank of Commerce, as provided in Con. Gen. Order 352, and in no other manner.—*Bloomfield v. Brooke*, 265.

2. Con. Gen. Order 291.]—An order for payment of money into Court is an order for payment of money within the meaning of Consolidated Order 251.

Such an order does not require to be endorsed with the notice, Schedule N. to the Consolidated Orders.—*Nelson v. Nelson*, 194.

PERSONAL REPRESENTATIVE.

Con. Order 56.]—An application under Con. Order 56, for the appointment of a person to represent the estate of a deceased party, was refused where it was considered that the deceased could not be said to be “interested in the matters in question in the suit,” or that the personal representative if appointed would be merely a formal party.—*Leonard v. Clydesdale*, 142.

See ADMINISTRATION ORDER.

PETITIONS.

Practice as to—Irregularity—Dismissing for want of prosecution.]—It is unnecessary and irregular to file a petition before it is heard. The proper proceeding in order to bring it before the Court, is to serve a copy with notice of a day for hearing endorsed.

This practice is applicable to petitions under the Insurance Companies Act, 31 Vict. ch. 48. But, as by this Act no special procedure is provided for making application under it to the Court, where proceedings were initiated by a petition which had been filed but not served upon the respondents, nor brought to a hearing, after a lapse of fourteen months, the petition was treated as a bill, and ordered to be taken off the files for want of prosecution.—*Re Western Insurance Co.*, 86.

PLEADING.

1. Further time to plead.]—*Held*, that when further time to plead is allowed by order, made after the original time for pleading has expired, the extra time is to be computed from the date of the order, and not from the expiration of the original time allowed by law.—*McDonald v. McEwan*, 18.

2. Covenant — Never indebted — Nullity or irregularity.]—To an action in covenant the defendant pleaded never indebted: *Held*, not a nullity, but merely an irregularity.

Treating a pleading as a nullity does not prevent it afterwards being attacked as an irregularity.—*Abell v. Glenn*, 64.

3. Assignment of chose in action.]—Allegations in a declaration that a chose in action “was duly assigned in the manner required by the Act,” sufficient under 35 Vict. c. 12, sec. 4.—*Cousins v. Bullen*, 71.

4. Order giving leave to plead by a certain day, otherwise judgment.]—An order gave a plaintiff time to sign judgment as on default of plea, and gave defendants leave to plead by a certain day.

Held, that the plaintiff, after that day has elapsed, can sign judgment unless the plea is in by time limited by the order, even though it actually is on the files when judgment entered.—*Cousins v. Bullen*, 72.

5. Amendment to bill.]—Replication held irregular which contained new matter by way of confession and avoidance of the defence set up by defendant's answer. Such matter should be introduced by way of amendment to the bill.—*Cox v. Keating*, 316.

Striking out pleas.]—See STRIKING OUT PLEA—SET OFF.

See also EJECTMENT, 4—FILING PAPERS—INSURANCE — LACHES — MARRIED WOMAN, 3 — PRISONER.

POSSESSION.

See VENDOR AND PURCHASER, 2, 3, 7.

POSTAL CARD.

Evidence — Certificate.]—A certificate of a deputy clerk of the Crown in the shape of a postal card is note evidence.—*Johnson v. Loney*, 70.

POSTPONING TRIAL.

1. Law Reform Act—Difficult questions.]—It is no answer to an application to try a cause in a County Court on the ground that no difficult questions of law will arise, to put in affidavits which are properly grounds for postponing the trial.—*Mitchell v. Roberts*, 106.

2. Personal injuries — Inability to calculate damages.]—*Held*, that the inability properly to calculate the damages to the plaintiff from a personal injury, owing to a sufficient time not having elapsed from the receipt of the injury, is a sufficient ground for postponing the trial.—*Speers v. Great Western R. W. Co.*, 170.

See ALIMONY, 5.

PRISONER.

Declaring against—R. G. 100.]—R. G. 100 is imperative that a prisoner arrested and in close custody must be declared against before the end of the term after his arrest, and it is no excuse that a summons was pending during the last week of the term to set aside the *capias* and arrest.—*Houtaling et al. v. Cuttle et al.*, 251.

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PROCHEIN AMY.

See MARRIED WOMAN, 2, 5—SALE, 4.

PRO CONFESSO ORDER.

1. *Vacating—Delay—Answer filed ex gratiâ.]*—An order *pro confesso* was vacated and a defendant allowed to file an answer, notwithstanding great and unexplained delay, no sitting of the Court having been lost thereby.

Defence amounting to a plea to the jurisdiction allowed to be set up.—*Hamelyn v. Whyte*, 120.

2. *Vacating—Delay—Costs.]*—Two defendants allowed a bill to be taken *pro confesso* against them because they had not the means to employ a solicitor to defend the suit, and a *pro confesso* decree was obtained. An application to vacate the decree and for leave to answer was granted upon payment of costs, *a prima facie* good defence on the merits being shewn.—*Redford v. Todd*, 154.

PRODUCTION OF DOCUMENTS.

1. *Attorney and client.]*—*Held*, that a letter written by the agent of a bank to his manager at the dictation of the solicitor for the bank, and the reply to it, were privileged communications and not liable to production.—*MERCHANTS' BANK v. Moffatt*, 348.

1a. The following clause in an affidavit on production was *held* a sufficient statement of the nature of the documents produced: “I object to produce the documents set forth in the second part of the first schedule on the ground that being communications between solicitor and client, they are privileged.”—*Hamelyn v. Whyte*, 143.

2. *Corporation.]*—Mode of procedure to obtain discovery of documents from a corporation considered.]—*Lindsay Petroleum Co. v. Pardee*, 140.

3. *Materiality of discovery.]*—Before decree no discovery will be ordered which appears to the Court to be immaterial to the question to be tried at the hearing.—*MERCHANTS' BANK v. Tisdale*, 51.

4. *Privileged communications.*—In a suit to restrain the infringement of a patent, the plaintiffs objected to produce documents described as “professional opinions of the writers of them,” (who were engineers) “as to the validity of the patent, the subject matter of this suit,” claiming that they were privileged communications.

Held, that documents of this description are only protected where they have been obtained in view of or in anticipation of litigation which has actually taken place, and in which the discovery is sought.—*Toronto Gravel Road Co. v. Taylor*, 227.

5. *Books in daily use]*—A plaintiff was ordered to permit the inspection by the plaintiff of books in daily use in the defendant's business, which he objected to produce on that account, but

which he was willing to produce at the hearing of the cause. *Hamelyn v. White*, 143.

6. *Documents filed in another suit.]*—Documents formerly in the possession of the defendant, and filed by him in a Master's office in another suit, were directed to be produced by the defendant upon his being indemnified by the plaintiff against the expense of obtaining them out of Court.—*Ib.*

7. *Documents assigned.]*—It is no excuse for non-production, that the documents have been assigned to a third party, if the purpose for which they were assigned has been accomplished.—*British America Ass. Co. v. Wilkinson*, 268.

8. *Materiality.]*—The Court will not act merely upon an allegation by a party seeking to protect documents from production, that they are not material, if it appear from their nature, or otherwise, that they may afford material assistance to the party seeking production in establishing his case.—*Fraser v. Home Ins. Co.*, 45.

9. *Joint interest, but sole possession.]*—Where a party, having a joint interest in documents with a stranger to the suit, has the sole legal possession thereof, production will not be ordered unless the suit be of such a nature that the Court can say that the party having the legal custody sufficiently represents the other party interested.

But in such case the party in whose possession the documents are, will be required to give discovery of their contents, and to furnish the information in his affidavit on production with as much particularity as was required in answering interrogatories as to documents, under the former practice.—*Ib.*

10. *Married woman.]*—A suit was brought by a married woman to which her husband was joined as a defendant. The plaintiff filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matters in question in the suit. The defendant applied to compel further production, viz., of documents which, it appeared, the defendant, the plaintiff's husband, had in his possession. It was alleged that he held these documents for the benefit of the plaintiff, and that it was intended to use them at the hearing.

Held, (1.) That the possession of the husband could not be said to be the possession of the wife.

(2.) That a better affidavit will only be ordered upon proof of admission, under oath, by the party against whom the application is made, of having other documents in his possession besides those already produced.

(3.) That a *feme covert* plaintiff, whose husband is a defendant, is not bound to procure production of documents by her husband for the benefit of his co-defendants.

(4.) That the rule respecting the obtaining of discovery from a co-defendant protected the plaintiff's husband from liability to examination by his co-defendants.—*Brown v. Capron*, 203.

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11. *Better affidavit—Notice.*]—A motion for a better affidavit on production, as the alternative is that the party be committed upon failing to file the better affidavit, is substantially a motion to commit, and therefore requires four days' notice.—*Abel v. Hiltz*, 122.

12. *Examination of parties.*]—An affidavit on production is not within the provisions of Order 268, and therefore a party making one does not become liable to cross-examination upon it, except so far as this can be had by examination for discovery under Order 138.

Only one examination of a party under Order 138 can be had.—*Paxton v. Jones*, 135.

13. *What subject to.*]—The plaintiffs' case, for the purpose of discovery, consists of every thing necessary to obtain a decree, including what may be required to answer the defence set up.

An affidavit on production, made by defendant, in which he objected to produce certain books of account, was held insufficient to protect them from discovery, because it did not state that the books did not contain evidence substantiating the plaintiffs' case, or that they only related to the defendant's case.—*The Western of Canada Oil Co. v. Walker*, 191.

14. Under an arrangement made by one P. with his creditors, by way of composition, the defendant Mason held the estate of P. in trust to secure the reimbursement or indemnity of the plaintiffs and one Harvey, who became sureties for the payment of the composition. Some time afterwards, P. became again insolvent, and defendant, Mason, was appointed his assignee. A bill being filed to enforce the arrangement for indemnity charging that Mason, in breach of the arrangement, had suffered the estate to remain in the hands of P., documents held by Mason as assignee were held liable to production.—*Wagner v. Mason*, 187.

15. *Motion to commit.*]—Where an order limits a time to do an act, the order must be served before the time limited has expired, otherwise the party required to do the act will not be committed for disobedience.—*Ib.*

PROHIBITION.

1. *Judge's notes.*]—*Held*, that on an application for prohibition, &c., the Judge's notes at the trial should be accompanied by his report of the case.—*Fleming v. Livingstone*, 63.

2. *Division Court—When application may be made—Costs.*]—*Held*, that a prohibition may go in the first instance without the question of jurisdiction being raised by any proceeding in the Court below; but when a party applies without having raised the question in the Court below, he will not be allowed costs.—*Nerlich v. Clifford*, 212.

See DIVISION COURTS—TAVERN LICENSES.

QUARTER SESSIONS.

Appeal from—32-33 Vict. c. 31, sec. 71, O.]—

The above Statute, preventing applications touching the decision of a Judge at Quarter Sessions, in appeal, not only refers to cases where an adjudication has taken place therein, but even to where the appeal has gone off on a preliminary objection to the right of entering it.—*Regina v. Firman*, 67.

QUIETING TITLES' ACT.

1. 36 Vict. c. 8, sec. 31, O., does not make any alteration in the rule that a petitioner under the Act for Quieting Titles, must have substantially an estate in possession or a certificate will be refused.—*Re W. ½ Con. 6, Mono*, 150.

2. A married woman filing a claim under the Act for Quieting Titles will not be required to name a next friend, as sec. 41 of the Act provides that, for the purposes of the Act, a married woman shall be deemed a *feme sole*.—*Re McKim*, 190.

RAILWAY COMPANY.

An application under 36 Vic. c. 36, sec. 14, must be by summons, and if an order be obtained in the first instance it will be set aside.

The enquiry must be confined to the particulars finally given by applicant.—*Re Credit Valley R. W. Co., and County of Peel Bonus*, 62.

“Officer” of.]—See EXAMINATION UNDER A. J. ACT, 1873, 4, 5.

Opening switch to cause collision.]—See EXTRA-DITION.

RECEIVER.

Distress.]—An order had been made giving a receiver liberty to distrain for arrears of rent. Upon the application of a tenant distrained upon for discharge of this order, it appeared that the tenancy had determined more than six months before the order to distrain was made, so that distress could not be made under 8 Anne, c. 14, secs. 6 and 7. The order to distrain was therefore discharged.

No notice need be given to a tenant of an application for an order giving a Receiver leave to distrain.—*Paxton v. Dryden*, 127.

REFEREE IN CHAMBERS.

1. *Jurisdiction—Application in the nature of appeal—Irrregular filing.*]—When a deputy registrar, or other officer whose duty it is to file papers, receives and files a paper duly presented to him for that purpose, he does a ministerial act, and leaves the regularity of the proceeding on the part of the person presenting the paper to be objected to by any who may have an interest in objecting.

An application to the Referee impeaching the propriety of the filing is not an appeal, or in the nature of an appeal, from the deputy registrar, or other officer, so as to deprive the Referee of jurisdiction under 34 Vict. c. 10, sec. 2—*Waterous v. Farran*, 31.

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2. Jurisdiction.]—Under the circumstances of this case, the Referee was held to have no power to order a reference to a Master.—*Brown v. Dollard*, 113.

Vacating preceipe decree.]—See DISPUTING NOTE.

Leave to file supplemental answer.]—See SUPPLEMENTAL ANSWER.

Jurisdiction over solicitors.]—See ATTORNEY AND SOLICITOR, 2.

Examination of parties.]—See EVIDENCE, 2.

Execution of conveyances by married women.]—See MARRIED WOMANS, 6.

Order for sale.]—See SALE, 1.

REFERENCE TO MASTER.

Changing reference—Master having given an opinion while at the Bar.]—A Master of the Court, while in practice at the Bar, had given an opinion upon the construction of a will, with a view to a settlement, at the request of the plaintiff in this suit, and both on behalf of the plaintiff himself and on behalf of all the other persons interested under the will. A settlement not having been arrived at, this suit was instituted for partition, and in the suit the construction of the will was declared by the Court, which construction was more favourable to the defendant J. B. than that contained in the opinion of the Master. The decree ordered a reference to the Master to make partition among the parties in proportions specified.

A motion was thereupon made by J. B. for the removal of the reference from before the Master, on account of his having given an opinion in the case as above stated. The application was opposed by all the other parties interested, except one, but was granted, on the ground that the administration of justice should be above suspicion and should not be exposed even to groundless mistrust.—*Bigelow v. Bigelow*, 24.

REHEARING.

1. Delay.]—The rule that no rehearing will be allowed after the time limited, unless the delay is excused, will be strictly followed. The pendency of negotiations for settlement not a sufficient excuse.—*Re Mullarkey*, 95.

2. Leave to rehear—Mistake of solicitor.]—Leave to rehear will only be granted under very special circumstances.

Leave to rehear was refused where two rehearing terms had been allowed to pass through the inadvertence of the defendant's solicitor, who imagined that the defendant had a year, instead of six months, in which to rehear.—*Winnett v. Renwick*, 233.

Staying proceedings pending.]—See STAYING PROCEEDINGS, 4.

RELICTA VERIFICATIONE.

Signing judgment on—Reg. Gen. T. T. 1856, 2, 26.]—A judgment may be regularly signed on a *relictæ verificatione* without a Judge's order, and without the signature to the relinquishment being verified by affidavit.

It is proper on entering judgment in such a case to set out the plea, joinder of issue, and *relictæ*, upon the roll.—*Eakins v. Fraser et al.*, 297.

REPLEVIN.

Assignee in insolvency.]—Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding C. S. U. C. c. 29, sec. 2.

The question as to how far goods seized under execution or attachment are protected from the remedy by replevin discussed.—*Jameson et al. v. Kerr et al.*, 3.

REPLICATION.

In Chancery—Confession and avoidance—Amendment to bill.]—See PLEADING, 5.

REVISION.

See COSTS, 4, 7.

REVIVOR.

Death of co-defendant—Dismissing bill.]—Bill against two executors and others. One of the executors died. A motion by the surviving defendant, including co-executrix of deceased defendants, to compel plaintiff to revive, or in default, dismissal, was refused.

Held, that the proper parties to move, were the representatives of deceased defendant, and that the surviving defendants might move to dismiss in the usual way.—*Watson v. Watson*, 229.

SALE.

1. Immediate sale—Chambers.]—An order for an immediate sale will not be made in chambers, when the Master, pursuant to a decree made in Court, has fixed a day for payment, and it has not arrived. The motion must be made to the Court.—*Buell v. Fisher*, 51.

2. Trustee purchasing—Con. Order 331—Fraud in tenders.]—In an administration suit a sale by tender was ordered. The defendant J., who was the executor of the person whose estate was being administered, and also trustee for the sale of a portion of the land sold, procured four tenders, of different amounts, to be put in for the property, in the names of different persons but really for his own benefit. Every tender was for an amount less than the real value of the land. One of these tenders was accepted by the Master, and the person in whose name it was made, was declared the purchaser, and the sale to him confirmed. Subsequently he made a formal transfer to the defendant J.

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Upon the application of the plaintiff, the sale was set aside.

Held, also, that the plaintiff was entitled to apply to set aside the sale without requiring any others of the parties interested to join.—*Re Follis, Kilbourn v. Coulter*, 160.

3. *Without reserve—Sale irregular.*]—A sale under the decree of the Court cannot be adjourned by the vendor's solicitor without the authority of the Court.

Upon a sale without reserve, it is not open to the vendor to refuse a bid, however small.

An irregular sale acquiesced in by the plaintiff and one of the defendants who appeared in the suit, was held not to bind the other defendant against whom the bill was taken *pro confesso*.

Semblé, that if the plaintiff and the defendant who appeared were the only parties having concurred in the irregular proceedings, it would not be open to them to dispute the validity of those proceedings.—*O'Connor v. Woodward*, 223.

4. *Next friend of party having the conduct of suit being highest bidder.*]—Where the person having the conduct of a sale under a decree of the Court is the highest bidder, and applies to be confirmed as the purchaser, the application will not be granted if any of the parties in the suit object.

The plaintiff had the conduct of the sale, and the next friend of the plaintiff was the highest bidder. The Master certified that by reason of the next friend having bid, the sale was abortive. The certificate was not filed or confirmed. A motion by the plaintiff to confirm sale, notwithstanding the Master's certificate, was refused, as the guardian for the infant defendants objected, and an order for a re-sale was refused, because until the Master's certificate stood confirmed it was open to the parties to appeal from the certificate on the ground that the Master ought to have reported that the next friend was the purchaser; and because if the Master were right in finding the sale abortive no order for a re-sale was necessary.—*Crawford v. Boyd*, 278.

5. *Settled estate—28 Vict. c. 27, Imp. Act—19 & 20 Vict. c. 120, sec. 23.*]—The Court of Chancery has no power to order the sale of a portion of a settled estate, in order to raise money to make improvements upon the remainder.

The Court has no power to authorize a mortgage for that purpose. —*Re Moore's Settled Estate*, 281.

6. *Re-sale—Order for deficiency—Improvements.*]—The purchaser at a sale under a decree was by the decree declared entitled to an allowance for permanent improvements on the property. The purchaser died, and neither he nor his representatives having carried out the purchase, an order was made in the usual terms directing a re-sale and the payment of any deficiency by the administrator of the purchaser's estate. The lands were sold and realized less than the sum bid by the purchaser at the previous sale.

An order was granted allowing the amount of the deficiency on re-sale to be set off *pro tanto*

against the amount found due by the report for improvements.—*Ontario v. Sirr*, 277.

Staying sale under decree.]—See ABATEMENT, 5.

Purchaser under decree nisi.]—See DECREE NISI.

Delivery of possession.]—See same.

Error in deed—Construction of Statute.]—See STATUTE (CONSTRUCTION OF), 3.

Sale under Mortgage.]—See MORTGAGE.

SATISFACTION PIECE.

Signing before attorney in U. S.]—*Held*, that signing a satisfaction piece before a practising attorney in the United States as attorney for the party signing is a sufficient compliance with R. G. 64.—*Abernethy v. Beddome*, 162.

SECURITY FOR COSTS.

1. *Temporary absence.*]—A plaintiff out of the jurisdiction, with no certain place of abode, and having no property in this Province, though stating on affidavit that she was only temporarily absent, and intended to return, was ordered to give security for costs, there being no circumstances from which the Court could reasonably infer that the intention to return would certainly be carried out.—*Grant v. Winchester*, 44.

2. *Attorney's bill.*]—*Held*, that the fact of a client, who has applied to have an attorney's bill taxed, is out of the jurisdiction, is not a sufficient ground for an order for security for costs, but, upon special circumstances being shewn, it may be.—*In re A. B., an Attorney*, &c., 210.

3. *Ejectment—C. S. U. C. c. 27, sec. 76.*]—*Held*, on an application for security for costs under the above section, that the fact of the costs of the former unsuccessful actions having been paid, is not a ground for refusing to make an order.—*Chambers v. Unger*, 101.

4. *Trust property.*]—A suit was brought to recover possession of certain lands, of which the plaintiffs claimed to be trustees, and to restrain the defendant, an overholding tenant, from committing waste. An order for security for costs had been obtained against the plaintiffs, by reason of their being out of the jurisdiction. The plaintiffs applied to discharge the order on the ground that they had property within the jurisdiction, and the property relied on was the property in question in this suit.

Held, that the plaintiffs not being entitled in their own right to the property, it did not constitute sufficient security for costs.—*McKenzie v. Sinton*, 282.

5. *Insolvent Act, 1875, sec. 39.*]—In a suit by insolvent to set aside an attachment as fraudulently issued, security was ordered for the costs of the assignee, a defendant.—*Lee v. Moffatt*, 284.

6. *Limiting time for putting in security.*]—On an application to limit the time for putting in security for costs, a plaintiff was allowed the same

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length of time as she would have had for answering the bill, if she had been a defendant, such time to date from the application to limit the time.—*Grant v. Winchester*, 56.

7. Nature of property within the jurisdiction necessary to discharge order for.]—A plaintiff resident abroad will not be released from giving security for costs, unless he shew that he has property to the value of \$400 within the jurisdiction of the Court and available in execution.

Leasehold property may be sufficient. The plaintiff had property within the jurisdiction, consisting of a one-sixth interest (nominally worth \$2,666) in lands subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. This lease was for twenty-one years, and gave defendants an option to purchase; under its terms no rent or taxes were to be paid until the title had been quieted under the Act for Quieting Titles, or a certificate was refused; in the latter event the defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending.

The plaintiff's interest in this property was held insufficient to entitle him to the discharge of an order for security.—*Higgins v. Manning*, 147.

8. Order on praecipe.]—Where a bill described the plaintiff as "of the city of Toronto," but afterwards contained the following statement, "by the advice of a physician the plaintiff has sought change of air, and is now temporarily resident at Rochester."

Held, that it must be concluded that the residence was only temporary, and no order for security should be granted. Nature of the property within the jurisdiction necessary to discharge an order considered.—*Wilson v. Wilson*, 152.

9. An order for security for costs can only be obtained upon praecipe when the plaintiff admits on the face of the bill, that he is resident abroad, and there is nothing in the bill qualifying such admission.—*Ib.*

10. Property subsequently acquired.]—The subsequent acquisition of property is no ground for rescinding an order for security for costs.—*Reaume v. Leavitt, and Reaume v. Trowbridge*, 70.

11. Misdescription of the plaintiff in bill.]—The Court will order a plaintiff to give security for costs if he misdescribes himself in his bill through an improper motive, or with the intention of misleading the defendant, even though on the application for security, the plaintiff should furnish his true address.

A plaintiff who had been for several years and was at the time of the filing of the bill, resident in the United States, described herself in her bill as of the township of Bertie, in the Province of Ontario. Under these circumstances the Court refused to discharge an order for security, although the plaintiff had returned to the jurisdiction and stated that it was her intention to

reside there for the rest of her life.—*Waldron v. McWalter*, 145.

12. Certificate of state of cause.]—A certificate of the state of the cause is only necessary where the application for security for costs is made before answer filed.—*Grant v. Winchester*, 44.

See MARRIED WOMAN, 4.

SEQUESTRATION.

1. To entitle a party to the issue of a writ of sequestration for non-payment of money, it is not necessary, since Order 291, to shew that the order for payment and a demand thereunder have been personally served on the party ordered to pay.—*Long v. Long*, 137.

2. Before resorting to a writ of sequestration under Con. Order 291 for non-payment of money, a writ of *fit. fa.* goods should be issued; then, if that fails, an order attaching debts: and a writ of sequestration should only issue (1) where the lands are insufficient to satisfy the debt, and it therefore becomes important to realize the profits during the year that must elapse before the lands can be sold under a *fit. fa.*; or (2), where the interest of the debtor is of such a nature that it cannot be taken under a *fit. fa.*

This rule does not interfere with the power of the Court to order a sequestration instead of a *fit. fa.*, if occasion should require.—*Nelson v. Nelson*, 194.

3. Lands cannot be sold under a writ of sequestration.—*Ib.*

See PAYMENT INTO COURT, 2.

SERVICE OF PAPERS.

1. Papers put under office door.]—A notice of trial was put under the door of the office of defendant's attorney (the door being locked) about half-past five o'clock on the last day of service. It did not come into the hands of the defendant's attorney until next morning.

Held, that the service did not count until the latter period.—*McCallum v. The Provincial Ins. Co.*, 101.

2. Papers put under door — Wrong style of cause.]—A clerk, on the last day for notice of trial, while on his way to serve it, met the defendant's attorney's partner, who told him to go to the office and serve it there. When he arrived no one was in: he put it under the door, and it was not received until next day. The Christian name of defendant was wrong in the style of cause.

Held, that the manner of service was good on the ground that the partner of the attorney refused to receive the papers, but that the style of cause being wrong, the notice must be set aside. *Carnegie v. Rutherford*, 102.

3. At residence of attorney — Grown up servant.]—*Held*, that service upon a servant girl at the private residence of an attorney is good, and that the service counts from the time the papers

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are left, and not from the time they come into possession of the attorney.—*Murray v. Great Western R. W. Co.*

4. *On Toronto agent*—34 Vict. c. 12, s. 12, O.]—A notice to plead, when served on the Toronto agent of a country attorney, must demand a plea within ten days. A notice to plead which does not truly set out the time within which defendant must plead, before plaintiff can take his next step, is irregular.

An obscurity of the above enactment remarked upon.—*Moffatt v. Evans*, 16.

5. *On principals*.]—It is not irregular, under C. L. P. Act, sec. 61, to serve, in Toronto, a country attorney; and ten days' notice is not necessary under such circumstances.—*City Bank v. McKay*, 298.

6. *Computation of time—Service on agent*.]—See COMPUTATION OF TIME.

See also SUBSTITUTIONAL SERVICE.

SETTING ASIDE PROCEEDINGS.

Who may apply.]—See ANSWER, 1.

SET OFF.

Equitable—Striking out.]—*Held*, that an equitable plea to an action upon a promissory note, that the plaintiff had covenanted to pay the defendant's debts, which covenant he had broken, whereby the defendant was damnified to an amount equal to the amount of the note sued upon, is bad, and will be struck out as embarrassing.—*Griffith v. Griffith*, 172.

SETTING OF JUDGMENTS.

Costs of the day—Personal undertaking of attorney.]—*Held*, that a judgment purchased by defendant from a third party cannot be set off against the costs of the day, given to the plaintiff upon an application to postpone the trial, secured by the personal undertaking of the defendant's attorney to pay these costs, and upon which the plaintiff's attorney has a lien.—*Bennett v. Tregent*, 171.

SETTLED ESTATE.

See SALE, 5.

SEWER RATE.

See TAXES.

SHERIFF.

Suggestion of death on roll—Who entitled to execution.]—*Held*, that upon the death of a sheriff who had recovered judgment in an action on notes seized under a *fi fa*, his personal representative, and not his successor in office, is entitled to execution.—*Dickenson v. Harvey*, 170.

STATUTE (CONSTRUCTION OF).

1. Consideration of conflicting clauses in same Act.

Application of the maxim “*Expressio unius est exclusio alterius*.”—*Dain v. Gossage*, 103.

2. The word “section” does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment, of which there may be several included under one number.—*Ib.*

3. *Repeal of statute—No further proceedings to be had under Act repealed unless power expressly reserved*.]—36 Vict. c. 35, sec. 18, after repealing C. S. U. C. c. 59, and other Acts, contained the following words:—“saving any rights, proceedings, or things legally had acquired or done under the said Acts, or any of them.

Held, that these words preserved to rights, proceedings, and things completely had or done the efficacy which they had under the Act repealed, but did not continue the operation of the repealed Act for the purpose of perfecting rights, proceedings, or things not completely had, acquired, or done.

Where there was a material error in a confirmation deed of lands sold with the sanction of the Court under C. S. U. C., c. 79, an application made after the repeal of that Act for an order authorizing the execution of a new deed was refused.—*Re United Presbyterian Congregation of London*, 129.

STATUTE OF LIMITATIONS.

See DISPUTING NOTE.

STAYING PROCEEDINGS.

1. *Until costs of day paid*.]—*Held*, (1) That 29-30 Vict. c. 42, sec. 1, does not refer to costs of the same suit, but in some other suit, and consequently proceedings cannot be stayed in a suit in which costs of day have not been paid.

(2) That nevertheless this can be done on the ground of abuse of the process of the Court, where the proceedings are vexatious.—*Nicholson v. Coulson*, 65.

2. *Leave to amend within a certain time*.]—*Held*, that where, in an order to join issue and demur, leave is granted to amend within a certain time, without any express stay of proceedings, such leave operates as a stay until the expiration of such time.—*Taylor v. Grand Trunk R. W. Co.*, 170.

3. *Until costs of former action paid—Trespass—Malicious prosecution*.]—The plaintiff, in a previous action, sued in trespass for assault and false imprisonment, but was nonsuited on the ground that her remedy, if any, was by action for malicious prosecution. She accordingly sued in the latter form of action. The defendant then obtained a summons to stay all proceedings until the costs in the first action should be paid, on the ground that this suit was brought for the same cause of action. The summons having

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been made absolute, the plaintiff appealed. The Chief Justice of Ontario, before whom the appeal was heard, allowed the appeal and set aside the order staying proceedings, holding that trespass for assault and false imprisonment and case for malicious prosecution are clearly not the same cause of action.

Semble, that the jurisdiction to stay proceedings in cases of this kind should be sparingly used.—*Doolan v. Martin*, 319.

4. *Pending rehearing.*]—On motions to stay proceedings pending rehearing the Court will follow the practice laid down in the Error and Appeal Act with reference to staying proceedings pending an appeal to the Court of Error and Appeal.—*Campbell v. Edwards*, 159.

STRIKING OUT PARTY.

See AMENDMENT.

STRIKING OUT PLEA.

1. *Defence for time—False plea*—34 Vict. c. 12, sec. 8.]—*Held*, that a plea pleaded merely for time, and admitted in a proceeding in the cause to be false in fact, will be struck out under 34 Vict. c. 12, sec. 8, and leave given to sign final judgment.—*McMaster v. Beattie*, 162.

2. Plea will not be struck out unless admitted to be false.—*Turner v. Neill*, 295.

3. *Ejectment—Defence for time.*]—Ejectment on mortgage. Defendant appeared; but on examination under A. J. Act, 1873, he admitted the execution of the mortgage, and that the defence was merely for time. *Held*, that the appearance and defence could not be struck out on the authority of *McMaster v. Beattie, infra*, p. 162, as defendant was entitled to possession until plaintiff should prove his case.—*Metropolitan Building and Savings Society v. Rodden*, 294.

Equitable set-off.]—See SET-OFF.

STYLE OF CAUSE.

Irregular.]—See SERVICE OF PAPERS, 2.

SUBPOENA.

C. S. C. c. 78, secs. 4 *et seq.*, which authorize the issue of subpoenas to the Province of Quebec, does not take away the power of the Court to examine witnesses there by commission.—*Stratford v. Great Western R. W. Co.*, 91; *McIntyre v. Fair*, 110.

See EVIDENCE, 2.

SUBSTITUTIONAL SERVICE.

Means of knowledge—Con. Order 259.]—Substitutional service of the bill upon an absent defendant allowed where the affidavits stated that “none of the parties in this country were aware of the residence of the defendant; that the plaintiff’s solicitor had made diligent enquiry and could not find out where the defen-

dant resided; and that deponent was informed that the defendant led a wandering life; that she had been in Rochester about a month before, but that she intended shortly to make a move.” *Gordon v. Hanna*, 266.

SUMMONS AND ORDER.

Affidavits allowed to be read, though not filed when summons taken out: leave having been in fact given by the Judge, but no notice thereof given to the opposite party.—*Escott v. Escott*, 10.

SUPPLEMENTAL ANSWER.

Applications for leave to file a supplemental answer are properly made in Chambers before the referee: *Churton v. Frewen*, 13 L. T. N. S. 491, not followed. *Harding v. Harding*, 95.

TAVERN LICENSES.

Trial without jury—Depositions as evidence.]—*Held*, (1.) After an appeal to the Sessions from a conviction of a magistrate for selling liquor after 7 o’clock on Saturday evening, under 32 Vict. c. 32, sec. 23, is confirmed, a prohibition to the Sessions will not be granted.

(2.) That under the above section, it is irregular for the Judge who tries the case to call a jury, or to receive depositions of witnesses as evidence, but this is not ground for a prohibition.—*In re Brown and Wallace*, 1.

TAXES.

Charge on land—Sewer rate.]—The vendors contended that they were not liable to pay taxes which were not actually imposed on the 25th July.

Held, that under 32 Vict. c. 36, O., secs. 18 and 107, no matter at what time in the year a rate is imposed, the taxes relate back and are deemed to accrue and to be due for the purpose of forming a lien on the land from the 1st January. The vendors were, therefore, required to pay the proportion of the year’s taxes due up to the 7th October, the day from which the purchaser was to be deemed to be in possession.

A sewer rate imposed under 36 Vict. c. 48, O., sec. 384, sub-s. 52, forms no charge on land, and is, therefore, not an incumbrance which a vendor is bound to remove.

Semble, that a rate imposed under 36 Vict. c. 48, O., sec. 464, does form a charge upon land.—*Bank of Montreal v. Fox*, 217.

TAXATION.

See ATTORNEY AND SOLICITOR, 9, *et seq.*—COSTS, *passim*.

TERM’S NOTICE.

1. The necessity for a term’s notice arises after the lapse of one year, not four terms, from last proceeding.—*McLennen v. Lewes*, 211.

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2. *Held*, that the obtaining of a Judge's order by the defendant to set aside an irregular notice of trial, is not a proceeding within a year, which will entitle the plaintiff to proceed without giving a term's notice.—*Huston v. Wallace*, 299.

TRANSFERRING SUIT.

A suit will not be transferred to the Court of Chancery, with the view of being consolidated with a suit pending in it between the same parties.—*Frick v. Moyer*, 245.

TRESPASS.

For assault and false imprisonment not same cause of action as case for malicious prosecution.]
—See STAYING PROCEEDINGS, 3.

VACATING ORDER.

See LIS PENDENS—PRO CONFESSO DECREE.

VARIANCE.

See DIVISION COURTS, 4.

VENDOR AND PURCHASER.

1. *Effect of taking vesting order.]*—Payment of an incumbrance out of the purchase money in Court refused, the purchaser having accepted a vesting order.—*Kincaid v. Kincaid*, 95.

2. *Effect of purchaser taking possession.]*—A purchaser at a sale under a decree of the Court, who enters into possession of the land purchased, even though he does so by leave of the parties to the suit, is deemed to have accepted the title unless the sanction of the Court has been obtained to his entering into possession without waiving his right to call for a good title.—*Patterson v. Robb*, 114.

3. *Waiver of acceptance of title.]*—Acceptance of title by the act of the purchaser in going into possession, was held to be waived by the vendor's solicitors delivering the abstract of title, and answering some of the requisitions.—*Aldwell v. Aldwell*, 183.

4. *Waiver of right to object to title.]*—Where, after a sale under decree of the Court, an abstract had not been demanded, and no steps had been taken by the purchaser or his representatives for twenty-three months after the confirmation of the report, a reference as to title was refused, and the purchaser held to have accepted the title.—*Ontario Bank v. Sirr*, 216.

5. *Incumbrances not covered by vendor's covenants.]*—After a conveyance incumbrances upon the property sold were discovered, created by a former owner, but of which neither the vendor nor the purchaser had been previously aware. The covenants given by the vendor only extended to his own acts and the acts of those claiming under him.

Held, that the vendor was not bound to pay off the incumbrances; and therefore that the purchaser was not entitled to set off against them a balance of his purchase money remaining unpaid and secured by mortgage.—*Re Buck, Peck v. Buck*, 98.

6. *Execution of the conveyance.]*—Under the fifth clause of the standing conditions of sale the purchaser makes a sufficient tender of the conveyance for execution by delivering it to the vendor's solicitor; and it is the duty of the vendor to procure its execution by all necessary parties.

The purchaser is not bound to pay the expense of procuring the execution of the conveyance, unless there be an express condition to that effect.

Until the conveyance is completed and delivered to the purchaser, he may properly resist payment out of Court of any part of his purchase money.—*Weiss v. Crafts*, 151.

7. *Sale under decree—Interest—Objections to abstract—Con. Orders 390-393—Incumbrance—Sewer rates—Delivery of possession.]*—Where there is no stipulation as to interest, the general rule of the Court is that the purchaser, when he completes his contract after the time mentioned in the particulars of sale, shall be considered as in possession from that time, and shall from thence pay interest on his purchase money, taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then the Court gives the vendor no interest, but leaves him in possession of the interim rents and profits.

A sale under a decree took place on the 25th July. The time fixed for completion of the contract was 25th August (one month after the sale); but under the rule above stated the purchaser was relieved from payment of interest on his purchase money up to 7th October.

A purchaser is not entitled to require a vendor to pay the amount necessary to commute a sewer rate.

A purchaser, on receipt of the abstract, is, under Consol. Orders 390-3, bound within seven days to take all the objections he intends to take to the sufficiency of the abstract. These being removed, it is not open to the purchaser to take any further objections to the sufficiency of the abstract—he can only require the vendors to verify the title shewn on the abstract.

Under the standing conditions of sale, a purchaser is not entitled to possession until he has paid the full amount of his purchase money into Court.—*Bank of Montreal v. Fox*, 217.

8. *When purchaser entitled to rents and profits.]*—A purchaser is entitled to all the rents and profits arising from the estate purchased which accrue due subsequent to the time when he becomes such purchaser.

Where the conditions of sale were silent as to possession, and the purchase money was payable by instalments, and there was no stipulation as to securing the same by mortgage, held, that the purchaser was entitled to the rents and profits

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from the time of his purchase.—*Brady v. Keenan*, 262.

9 Right to rents and profits—Rent paid in advance and accrued due before day of sale.]—By the conditions of a sale the purchaser was entitled to a conveyance one month after the day of sale, upon forty per cent. of his purchase money being then paid and the remainder secured, but he was not entitled to possession, except for the purpose of doing the fall ploughing, until the expiry of a subsisting lease of the premises. The rent payable under the lease was payable yearly in advance, and a year's rent accrued due a few days before the day of sale.

Held, that the purchaser was entitled to a proportionate part of the rent received in advance for that portion of the term which had to expire subsequently to the day fixed for the termination of the contract, *i. e.*, one month after the day of sale.—*Liscombe v. Gross*, 271.

10. Incumbrance created pendente lite—Consent decree.]—A defendant, who claimed to be the sole owner of the land in question, *pendente lite* sold to one B. the right to cut timber on the land. The purchaser at the sale under decree refused to carry out his purchase until the right was released, which H. refused to do.

Held, that the decree having been made by consent, H. was not bound by it, and that, therefore, the existence of H.'s incumbrance was a valid objection to the title, and had not been waived by the purchaser's merely taking a consent to obtain, without having actually obtained, a vesting order, nor by his having, under the circumstances, had the conveyance settled by the Master without making H. a party to it.

The party having the conduct of the sale represents, for the purpose of the sale, so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove, or procure to be removed, any objection which may properly be made to the title.—*Street v. Hallett*, 312.

11. Expense of registry of mortgage.]—A purchaser, who, to secure a balance of purchase money, has given a mortgage to the Court, must pay the fees for registration of his mortgage.—*Sweetnam v. Sweetnam*, 83.

12. Compensation—Waiver of objection to title—Advertisement.]—A purchaser by taking a conveyance or vesting order waives all objections to the title. He also takes upon himself the responsibility of obtaining possession, and, if evicted by a title to which his covenants do not extend, he has no right to compensation on that account.

Misdescription in the advertisement is a ground for compensation even after conveyance.—*Bull v. Harper*, 36.

Taxes and sewer rates—When a charge on land.]—See TAXES.

VENUE, (CHANGE OF.)

1. Preponderance of convenience.]—The venue will not be changed, when there is no great pre-

ponderance of convenience, merely on the ground that the cause of action arose in the county to which it is sought to change the venue. The place where the cause of action arose, is merely a circumstance in the discussion, and of no importance as compared with the preponderance of convenience.—*Gilmour v. Strickland*, 254.

2. Cause of action.]—When the place where the cause of action arose and the place of residence of the defendant and his witnesses concur, a change of venue will be ordered to such county; although the plaintiff's witnesses reside where the venue is laid.—*Harper v. Smith*, 9.

3. Parties living out of the jurisdiction.]—In moving to change the venue, the fact that one party lives out of the jurisdiction, does not affect the equities between the parties.—*Ansell v. Smith*, 62.

4. Cause of action—Balance of convenience.]—The locality of the cause of action is not much regarded in Chancery as a ground for changing the venue.

When the venue has once been laid, a very large preponderance of convenience must be shown to change it, and, in investigating this, regard will be paid to the ability of witnesses to travel, and to the probability of a postponement of the hearing being the result of a change.

Between private individuals it is impossible to say that one class of witness will be more injured than another class by absence from home. Between a private individual and a public officer this may be considered.—*Noad v. Noad*, 48.

5. Balance of convenience — Costs.]—If the plaintiff lays the venue in a confessedly improper place he is liable to be visited with the costs of a motion to change the venue.

The defendant and six of his witnesses lived in the county of Huron, and the plaintiff, an infirm person, sixty-five years of age, and three of her witnesses, lived in the county of Oxford. The venue was laid in Brantford. It was alleged by the defendants, and not denied by the plaintiff, that the plaintiff had witnesses in the county of Huron. *Held*, that the balance of convenience was in favour of the venue being at Goderich, in the county of Huron.—*Martin v. Ross*, 264.

6. Difference in expense.]—Where the venue was laid at London, and it appeared that the defendant, six of his witnesses and one of the plaintiffs witnesses resided at Clinton, in the county of Huron, and that the plaintiff and three of her witnesses resided at London (her other witnesses being at a distance, and one of them resident out of the Province,) and that in procuring the attendance of the witnesses residing at Clinton and London there would be only a difference of \$15 or \$16 in favour of hearing the cause at Goderich, in the county of Huron.

Held, that this difference in expense was not sufficient to deprive the plaintiff of the right of having the cause heard at London, where the venue was laid.—*Mooney v. Mooney*, 267.

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VOTERS' LIST.

37 Vict. c. 4, sec. 3.]—The list of voters required to be posted to various persons under 37 Vict. c. 4, was prepared and certified by the clerk of the municipality, ready for transmission on a certain day, but he died before that day came, and they were in fact transmitted by his successor without any alteration in the certificate. They were regular in every respect, with this exception.

Held, that as sec. 3 of 37 Vict. c. 4, was only directory, and as the object of the statute was fulfilled to all intents and purposes, the list was sufficient to give jurisdiction to the County Judge to revise it.—*In re Revision of the Voters' List of the Township of Goderich, &c.*, 213.

WAIVER.

See LACHES—VENDOR AND PURCHASER, 2, 3, 4, 7—WRIT OF SUMMONS, 2.

WILL.

Revocation.]—*Held*, under 32 Vict. c. 8, that a will is not revoked by destruction by the direction of the testator, unless the destruction take place in his presence. Also, that the birth of a child after the making of a will does not revoke the will.—*Re Tobey*, 272.

WITNESS.

See EVIDENCE.

WRIT OF SUMMONS.

1. Amending—Resealing—Endorsement—Interest.]—A writ of summons may, after the issue and before service, be amended on preceipe by substituting a new plaintiff, without an order, and on such amendment there is no necessity for resealing, nor need it appear on the copy served that any amendment has been made.

If the writ be specially endorsed for interest, the notice required by Common Law Procedure Act, sec. 15, may claim such interest without shewing the date from which it is to be calculated.—*Worthington v. Boulton*, 68.

2. Local action—Waiver.]—A summons to set aside a declaration (the venue being laid in the proper county) on the ground that the writ issued in a local action in the wrong county discharged, the defendant having duly appeared to the writ.—*Warcup v. Great Western R. W. Co.*, 250.

3. For service within jurisdiction—Served out of.]—Leave granted to issue *nunc pro tunc* a concurrent writ for service out of jurisdiction, to make good a service on a defendant whose domicile was within jurisdiction, but who had been served out of it with writ for service within.—*Metcalf v. Davis et al.*, 275.

